92-672

Supreme Court, U.S.
FILED
SEP 16 1992
OFFICE OF THE CLERK

Case No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

NICHOLAS G. NAVARRO, SHERIFF OF BROWARD COUNTY,

Petitioner,

vs.

LUKE RECORDS, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER A PARTY/DEFENDANT WHO IS CHARGED WITH THE BURDEN TO PROVE "OBSCENITY" IN A CIVIL OBSCENITY CASE PREDICATED UPON 42 U.S.C. §1983 AS THAT TERM HAS BEEN DEFINED IN **MILLER v. CALIFORNIA,** 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), MUST CALL EXPERT WITNESSES TO REBUT THE EXPERT TESTIMONY OFFERED BY AN OPPOSING PARTY/PLAINTIFF, REGARDING THE THIRD PRONG OF **MILLER,** SUPRA WHERE THE PARTY/DEFENDANT'S SOLE EVIDENCE OF OBSCENITY IS THE ALLEGEDLY OBSCENE LYRICS OF THE MUSICAL COMPOSITION

ITSELF, i.e. IS IT CORRECT THAT A DISTRICT COURT JUDGE SITTING AS THE FINDER OF FACT DURING SUCH A CIVIL CASE CANNOT LEGALLY DETERMINE WHETHER THE LYRICS OF A MUSICAL COMPOSITION ARE, IN FACT, OBSCENE ABSENT EXPERT REBUTTAL EVIDENCE, AND CANNOT RELY UPON THE INTRODUCTION OF THE ALLEGEDLY OBSCENE MATERIAL ITSELF AS THE ONLY EVIDENCE OF OBSCENITY IN REGARD TO THE THIRD PRONG OF **MILLER,** SUPRA?

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The Petitioner, NICHOLAS G. NAVARRO, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 7, 1992.

OPINIONS BELOW

The Final Order dated June 6, 1990, issued by the United States District Court Trial Judge appears in the Appendix attached hereto. The Order of the United States Court of Appeals for the Eleventh Circuit, dated May 7, 1992, reversing, per curiam, the Final Order of the district court and Order Denying the Petition for Rehearing and Suggestion of Rehearing En Banc dated July 20, 1992, appear in the Appendix attached hereto.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on May 7, 1992. A timely Petition for Rehearing and Suggestion of Rehearing En Banc was denied on July 20, 1992, and this Petition for Certiorari is being timely filed within 90 days of the rendering of that Order. Jurisdiction of this Court is invoked pursuant to \Title 28 U.S.C. §1254(1).

Question Presented

WHETHER A PARTY/DEFEN-DANT WHO IS CHARGED WITH THE BURDEN TO PROVE "OBSCENITY" IN A CIVIL OBSCENITY CASE PREDICATED UPON 42 U.S.C. §1983 AS THAT TERM HAS BEEN DEFINED IN **MILLER v. CALIFORNIA,** 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), MUST CALL EXPERT WITNESSES TO REBUT THE EXPERT TESTIMONY OFFERED BY AN OPPOSING PARTY/PLAINTIFF, WHERE THE PARTY/DEFENDANT'S SOLE EVIDENCE OF OBSCENITY IS THE ALLEGEDLY OBSCENE LYRICS OF THE MUSICAL COMPOSITION ITSELF, i.e. IS IT CORRECT THAT A DISTRICT COURT JUDGE SITTING

AS THE FINDER OF FACT DURING SUCH A CIVIL CASE CANNOT LEGALLY DETERMINE WHETHER THE LYRICS OF A MUSICAL COMPOSITION ARE, IN FACT, OBSCENE ABSENT EXPERT REBUTTAL EVIDENCE, AND CANNOT RELY UPON THE INTRODUCTION OF THE ALLEGEDLY OBSCENE MATERIAL ITSELF AS THE ONLY EVIDENCE OF OBSCENITY IN REGARD TO THE THIRD PRONG OF **MILLER,** SUPRA?

Statutory Provision Involved

United States Code, Title 42 §1983, Civil Action for Deprivation of Rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code, Title 28 §2201(a),

Creation of Remedy:

(a) In a case of actual controversy within its jurisdiction except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or counter-vailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force

and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

Luke Records, Inc., a Florida corporation (hereinafter referred to as "LUKE RECORDS"), and a musical group known as "2 Live Crew" produced a recording entitled "As Nasty As They Wanna Be" (hereinafter referred to as "NASTY").

Petitioner Nicholas G. Navarro (hereinafter referred to as "NAVARRO") is the duly elected Sheriff of Broward County, Florida.

In February of 1990, as the result of complaints made by South Florida residents, the Broward Sheriff's Office began an investigation of the NASTY recording, in order to determine if probable cause existed to believe that the NASTY recording violated §847.011, Florida Statutes (1990), which is Florida's "obscenity" law. A detective was assigned to the case, and on February 26, 1990, he purchased a copy of the NASTY recording from a local retail music store. The detective then had six of the eighteen songs on the recording transcribed and, along with those transcripts, he submitted a copy of the recording in cassette tape format, as well as an affidavit

detailing the facts of his investigation, to the Hon. Mel Grossman, who is a state Circuit Court Judge in Broward County, Florida. On March 9, 1990, the Hon. Mel Grossman issued his order finding probable cause to believe that the recording NASTY was obscene as defined by §847.011, Florida Statutes (1990) and applicable decisional law.

Thereafter, the Broward Sheriff's Office distributed copies of Judge Grossman's order to various local retail music stores, and provided a warning that continued sales of NASTY could result in arrest. These events were extensively covered by local media with the result being that local sales of the NASTY recording ceased.

On or about March 16, 1990, LUKE RECORDS filed a cause of action in the United States District Court for the Southern District of Florida pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief. Therein LUKE RECORDS sought to enjoin NAVARRO from interfering with the sale of NASTY. LUKE RECORDS also sought a declaratory judgment pursuant to 28 U.S.C. §2201 that the

recording NASTY was not obscene as that term has been defined in **Miller,** supra. A non-jury trial was held before the district court on May 14th and 15th, 1990. The district court indicated in its Order dated June 6, 1990, at Page 2, that:

> "The Court has considered the pleadings, exhibits, testimony of the witnesses, plus argument of able counsel. By the stipulation of the parties, the trial record also includes all evidence and argument presented at the Plaintiff's preliminary injunction hearing held April 19, 1990."

During that trial, LUKE RECORDS introduced expert testimonial evidence which was designed to support LUKE RECORDS position that the application of the test announced in **Miller,** supra to the recording NASTY should result in a finding that the recording is not obscene. NAVARRO, through counsel, conducted cross-examination of each of LUKE RECORDS' expert witnesses, thereby providing the trier of fact a complete picture regarding the significance of said expert testimony and the weight, if any, the trier of fact should give same. Furthermore, NAVARRO, through counsel during its case-in-chief, introduced the actual recording NASTY as evidence that the recording itself was, in fact, obscene as that

term has been defined in **Miller,** supra. NAVARRO, through counsel, did not call expert witnesses of his own to rebut the expert testimony offered by LUKE RECORDS and instead relied upon his cross-examination of LUKE RECORDS' expert witnesses and the recording NASTY as evidence that NASTY is obscene. At the conclusion of the non-jury trial, the Hon. Jose A. Gonzalez, Jr., U.S. District Court Judge entered a Final Order wherein the district court granted the injunction, as the trial court determined that NAVARRO'S actions constituted an unconstitutional prior restraint on free speech. (Appendix A)(NAVARRO did not appeal this ruling below.) The trial court also declared that the recording NASTY is obscene under **Miller,** supra. (Appendix A)

The United States Court of Appeals for the Eleventh Circuit reversed on the issue of obscenity and concluded in pertinent part, as follows:

> "The Sheriff concedes that he has the burden of proof to show that the recording is obscene. Yet, he submitted no evidence, [other than the recording NASTY itself and cross-examination of Respondent's witnesses] to contradict the testimony that the work had artistic value. A work cannot be held obscene

unless each element of the *Miller* test has been met. We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value." (Appendix B)

The United States Court of Appeal for the Eleventh Circuit subsequently denied NAVARRO'S Petition for Rehearing and Suggestion of Rehearing En Banc. (Appendix C)

ARGUMENT

Reasons for Granting the Writ

1) The decision of the Eleventh Circuit Court of Appeal is contrary to decisions previously rendered by this Court, and addresses an important question of federal law (whether experts must testify regarding the third prong of **Miller,** supra in an obscenity case involving the lyrics of a musical composition) which has not been, but should be, settled by this Court. Furthermore, the Eleventh Circuit decision departs from an accepted and

usual course of judicial proceedings, calling for this Court to exercise its power of supervision.

This case, in a nutshell, involves the question of "what type" and "how much" evidence or rebuttal evidence is required to satisfy the third prong of **Miller,** supra in an obscenity case, operating under the assumption that where "musical lyrics" are involved, a district court judge, sitting as finder of fact, does not have the wherewithal to determine whether the musical lyrics are obscene under **Miller,** supra simply by listening to the lyrics themselves. In short, "[t]he panel decision of May 7, 1992, is a remarkable departure from the traditional concepts of evidence, weight of evidence, district court discretion in the admission of evidence and fact finding by judge or jury. It is an unprecedented ruling that in obscenity cases, the government must have expert testimony to rebut expert testimony regarding the third prong of **Miller,** supra, as applied to the musical lyrics. There are no other cases that give such conclusive effect to the weight and credibility of expert testimony." (Appendix D, at Pg.

6)

The Eleventh Circuit Court of Appeals indicated in its Order that,

> "It can be conceded without deciding that the Judge's familiarity with contemporary community standards is sufficient to carry the case as to the first two prongs of the **Miller,** supra test. . . ." (Appendix B)

The Eleventh Circuit then went on to conclude that,

> "The record is insufficient, however, for this court to assume the fact finder's artistic or literary knowledge or skills to satisfy the last prong of the **Miller**, supra analysis which requires determination of whether a work 'lacks serious artistic, scientific, literary or political value.'" (footnotes omitted)

Petitioner questions whether any record could ever contain evidence of the fact finder's personal knowledge regarding artistic or literary topics. Is it now the law that in obscenity cases involving the lyrics of a musical composition that finders of fact, whether they be judges or jurors, be required to testify on the record to the extent of their knowledge of artistic or literary topics? If so, then this decision will certainly be considered a milestone in constitutional law. The Eleventh Circuit, not seeing any evidence of the finder of fact's personal

knowledge of artistic or literary topics then concludes that Judge Gonzalez could not apply the third prong of **Miller,** supra where the sole evidence of obscenity was the cross-examination of Plaintiff's expert witnesses and the recording NASTY itself. This peculiar result perhaps can be attributed to the fact that the Eleventh Circuit has never been called upon to review an obscenity case involving the lyrics of a musical composition.[1] In short, the Eleventh Circuit has drawn a distinction between the allegedly obscene lyrics of a musical composition and any other form of allegedly obscene material, with the result being that the former should be given some greater protection under the law, by requiring expert testimony to assist the ill-equipped finder of fact in the application of the third prong of **Miller,** supra.

The Eleventh Circuit has decided that as a matter of

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[1]This case is apparently the first time that a court of appeals has been asked to apply the **Miller,** supra test to a misical composition, which contains both instrumental music and lyrics. (2/footnotes omitted) Although we tend to agree with Appellant's contention that because music possesses inherent artistic value, no work of music alone may be declared obscene, that issue is not present in this case." (Appendix B)

federal constitutional law, expert testimony must be offered by the party with the burden to prove obscenity, in order to meet the requirement of the third prong of **Miller,** supra, where the allegedly obscene material involves the lyrics of a musical composition. The Court in so holding specifically rejected the argument that the finder of fact (in this case a district court judge) could rely on its review of the allegedly obscene material as the sole evidence that the material lacks serious artistic, scientific, literary or political value.

This Court, in **Miller,** supra, revised the third prong of the obscenity test previously formulated in "Memoirs,"[2] thereby imposing a lesser burden upon the party charged with proving obscenity.[3] The Eleventh Circuit has now determined that the application of the third prong of **Miller,** supra to allegedly obscene musical lyrics requires "more" evidence than would be

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[2]**Memoirs v. Massachusetts,** 383 U.S. 413 (1966) from **Hamling v. U.S.,** 418 U.S. 87, 94 S.Ct. 2887 (1974)

[3]The **Miller,** supra court made this revision as this aspect of "Memoirs" "represented a departure from the definition of obscenity in **Roth** and because . . . it imposed a burden virtually impossible to discharge . . ." **Hamling,** supra

necessary in an obscenity case involving another form of material such as film or books. This increased burden is not required by federal constitutional law and this court should clarify this point, as there should be no distinction between one form of allegedly obscene material and another in terms of the application of the third prong of **Miller,** supra.

It is axiomatic that the First Amendment to the United States Constitution, among other things, protects communications and expressions regardless of their technological format. It is this flexibility that gives this amendment to the Constitution its resilience in the face of mans technological advancement in forms of communication and expression. Likewise, it is well settled that certain types of communication and expression are not afforded First Amendment protection. Obscene speech represents only one type of unprotected speech. Therefore, if "speech" is obscene, it is not protected, regardless of what technological form it comes in, be it film, laser video disc, stage performance or musical lyrics. The question is: Is it obscene? The answer is

found in the application of **Miller,** supra. The Eleventh Circuit has now modified the third prong of **Miller,** supra by requiring more evidence than what is otherwise required simply because this case involves a form of communication, i.e. musical lyrics, that the **Miller,** supra test had not been previously applied to. This decision is clearly contrary to the decisions of this Court regarding application of **Miller,** supra.

In **Kaplan v. California,** 413 U.S. 115, 93 S.Ct. 2680 (1973), the prosecution tendered the obscene book (Suite 69) and the testimony of a vice police officer as an expert on obscenity. "No expert state testimony was offered that the book was obscene under national standards or that the book was utterly without redeeming social importance despite expert defense testimony to the contrary." This Court indicated that the record, as a matter of federal constitutional law, supported the conviction and indicated in a footnote that ". . . the prosecution's introduction of the book itself into evidence was adequate as a matter of federal constitutional law, to establish the book's obscenity." Thus **Kaplan,** supra involves the same issue of

unrebutted expert opinion testimony as does the case at bar. The result is that the record contained in the **Kaplan,** supra case was sufficient as a matter of federal constitutional law to support criminal convictions, however, where the allegedly obscene material is the lyrics of a musical composition the same record would not support the finding of obscenity in a civil case predicated upon 42 U.S.C. §1983. This Court in **Miller,** supra specifically stated:

> "**The basic guidelines for the trier of fact must be:** (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. (citations omitted); (b) whether the work depicts or describes, in a patently offense way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." (emphasis supplied)

Now, in the Eleventh Circuit where the "work" is the lyrics of a musical composition, the "**basic guidelines for the trier of fact**", regarding application of the third prong of the **Miller,** supra test must include expert testimony as the trier of fact does not possess the expertise necessary to apply the third prong to a musical composition. (emphasis supplied)

The Honorable Jose Gonzalez, sitting as finder of fact at the district court level, indicated that "the law does not require expert testimony in an obscenity case. The defendant introduced the Nasty recording into evidence. As noted by the Supreme Court in **Paris Adult Theater I v. Slaton,** 413 U.S. 49, 93 S.Ct. 26, 37 L.Ed.2d 446 (1973), when the material in question is not directed to a bizarre, deviant group not within the experience of the average person, the best evidence is the material, which can and does speak for itself." (See Appendix A, Pg. 24) This is a correct statement of the law.

CONCLUSION

The law is clear. The test announced by this Court in **Miller,** supra, applies to the allegedly obscene lyrics of a musical composition. It is also clear that the law does not require expert testimony in the application of any of the prongs of the **Miller,** supra test. Likewise, it is well settled that the finder of fact, be it juror or judge, can rely on the allegedly obscene material itself in application of all three prongs of the **Miller,**

supra test. The Eleventh Circuit should not be allowed to make it a requirement of federal constitutional law that the finder of fact must be presented with expert testimony and cannot rely upon introduction of the allegedly obscene material itself in application of the third prong of **Miller,** supra simply because the allegedly obscene material involves lyrics of a musical composition. Therefore, this Court should grant this Petition and re-establish the correct federal constitutional law in the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 90-6220-CIV-JAG

SKYYWALKER RECORDS, INC.,;
LUTHER CAMPBELL; MARK ROSS;
DAVID HOBBS;
and CHRIS WONGWON;

Plaintiffs,

v.

NICHOLAS NAVARRO,

Defendant.

FINAL ORDER

This is a case between two ancient enemies: Anything Goes and Enough Already.

Justice Oliver Wendell Holmes, Jr. observed in Schenck v. United States, 249 U.S. 47(1919), that the First Amendment is not absolute and that it does not permit one to yell "Fire" in a crowded theater. Today, this court decides whether the First Amendment absolutely permits one to yell another "F": word anywhere in the community when combined with graphic sexual descriptions.

Two distinct and narrow issues are presented: whether the recording As Nasty As They Wanna Be (Nasty) is legally obscene; and second, whether the actions of the defendant Nicholas Navarro (Navarro), as Sheriff of Broward County, Florida, imposed an unconstitutional prior restraint upon the plaintiffs' right to free speech.

It is before the court following a trial on the merits held May 14 and May 15, 1990. The court has considered the pleadings, exhibits, the testimony of the witnesses, plus argument of able counsel. By the stipulation of the parties, the trial record also includes all evidence and argument presented at the plaintiffs' preliminary injunction hearing held April 19, 1990.

THE PLAINTIFFS

The plaintiff Skyywalker Records, Inc. (Skyywalker) is a Florida corporation headquartered in Miami, Florida. The plaintiffs Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon, constitute the group known as "2 Live Crew" whose recording, As Nasty As They Wanna Be, is the subject of this lawsuit. Luther Campbell is also the President, Secretary, sole

shareholder, and sole director of Skyywalker.

The plaintiffs have brought this action under section 1983, Title 42 of the United States Code, which provides a federal statutory remedy for unlawful deprivations of federal rights including those liberties guaranteed under the United States Constitution. The plaintiffs also seek a declaration of their legal rights, under the Federal Declaratory Judgment Act, 28 U.S.C. §2201(a), and injunctive relief under section 2202(b) thereof. This court has previously denied the plaintiffs' motion for a preliminary injunction by ore tenus order entered April 19, 1990. There is no prayer for money damages.

Because this is a civil action, the party with the burden of proof must prevail by a preponderance of the evidence. On the issue of obscenity, the defendant Navarro has the burden of proof. As to the prior restraint claim, however, the plaintiffs have the burden to prove, beyond a preponderance of the evidence, that the defendant's actions were unconstitutional.

It must be emphasized at the outset that this decision does not criminalize the plaintiffs' conduct, nor does it charge

anyone with a crime. That is a matter for the police and the criminal courts to determine. Whether the plaintiffs are guilty of a crime can only be decided if criminal charges are brought, a trial by jury conducted, and all other due process requirements have been met. Whether As Nasty As They Wanna Be is criminally obscene is left for the determination of another court on another day.

THE FACTS

The recording As Nasty As They Wanna Be was released to the public by 2 Live Crew in 1989. To date, public sales have totalled approximately 1.7 million copies. The recording is available in various formats including phonograph records, cassette tapes, and compact discs. 2 Live Crew has also produced a recording entitled As Clean As They Wanna Be (Clean) which has sold approximately 250,000 copies. Although neither party introduced Clean into evidence, it apparently contains the same music as Nasty but without the explicit sexual lyrics.

In mid-February 1990, the Broward County Sheriff's

office began an investigation of the Nasty recording. The investigation began in response to complaints by South Florida residents.

Broward County Deputy Sheriff Mark Wichner was assigned to the case. On February 26, 1990, he traveled to Sound Warehouse, a Broward County retail music store, and purchased a cassette tape copy of the Nasty recording. The tape was purchased from an open display rack marked "Rap Music", easily accessible to all of Sound Warehouse's customers regardless of age.

Deputy Wichner listed to the Nasty recording, had six of the eighteen songs transcribed, and prepared an affidavit detailing these facts requesting that the Broward County Circuit Court find probable cause that the Nasty recording was legally obscene. On February 28, 1990, Deputy Wichner submitted the affidavit, an attached transcript of the six songs, and the tape cassette of the Nasty recording to the duty judge of the Broward County Circuit Court, the Honorable Mel Grossman. The communications between Deputy Wichner and Judge Grossman

were limited to the filing of the affidavit, transcript, and tape cassette. Several days later, Judge Grossman's chambers contacted the deputy and requested further information concerning the location in Sound Warehouse of the Nasty recording and its accessibility to the public. Deputy Wichner communicated that information to the judge.

On March 9, Judge Grossman issued an order after reviewing the Nasty recording "in its entirety." The judge explicitly found probable cause to believe this recording was obscene under section 847.011 of the Florida Statutes and under applicable case law.

The Broward County Sheriff's office received and copied the order, and distributed it county wide to retail establishments that might be selling the Nasty recording. It decided to "warn the stores as a matter of courtesy" rather than make an initial arrest because, according to Deputy Wichner's testimony, such conduct would have been overaggressive. The Sheriff's office has not opened any investigations of other musical recordings because of the absence of citizen complaints.

Thereafter, Deputy Wichner re-visited the store where he had purchased the original recording plus another Sound Warehouse outlet and a store called Uncle Sam's Records. On these visits, the deputy wore a jacket marked "Broward County Sheriff" and displayed his badge in plain view. He spoke with a manager in each of the three stores, provided them with a copy of Judge Grossman's order, and told them, in a friendly conversational tone, that they should refrain from selling the Nasty recording. The managers were warned that further sales would result in arrest and that if convicted, the penalty for selling to a minor was a felony, and a misdemeanor if sold to an adult. Between fifteen and twenty different Broward County stores were personally visited by the Sheriff's office, and the evidence indicates that each of the visits was conducted in the same manner as were Deputy Wichner's three stops.

The Sheriff's office warnings were very effective. Within days, all retail stores in Broward County ceased offering the Nasty recording for sale. Those stores not directly visited by deputy sheriffs pulled the recording from their shelves after

hearing about the visits from television and radio reports. Some stores continued to sell the Clean recording. Nasty was no longer sold even by stores having a policy of specially marking the recording with a warning, and of not selling it to minors. 2 Live Crew also includes a small statement on the front of the paper insert to their records, as follows: "WARNING: EXPLICIT LANGUAGE CONTAINED".

The Broward County Sheriff's office took no further action because there was no information that any store was selling the Nasty recording.

On March 16, 1990, the plaintiffs filed this action in federal district court. On March 27, 1990, Sheriff Nicholas Navarro filed an in rem proceeding in Broward County Circuit Court against the Nasty recording seeking a judicial determination that it was obscene under state law. See Navarro v. The Recording "As Nasty As They Wanna Be", case number 90-09324(12) (Reasbeck). There is no evidence of the status of the state case including whether a trial date has been set. No criminal proceedings against either the recording or the group

2 Live Crew have been instituted.

OBSCENITY AND THE FIRST AMENDMENT

The First Amendment to the United States Constitution provides that "Congress shall make no law...abridging the freedom of speech." The Fourteenth Amendment declares that "[n]o State shall...deprive any person of...liberty...without due process of law." It is now well established that this "liberty" includes the right to free speech. See Chaplinsky v. New Hampshire, 315 U.S. 568,570-71(1942); Roth v. United States, 354 U.S. 476,479-80(1957); Stanley v. Georgia, 394 U.S. 557,559(1969); Miller v. California, 413 U.S. 15,20(1973). Hence, neither the federal nor the state governments may abridge this Constitutional right.

The First Amendment is one of our most sacred liberties since freedom of thought and speech are the key to the preservation of all other rights. Free speech plays a critical role in furthering self-government, in encouraging individual self-realization, and fostering society's search for truth via exposure to a "marketplace of ideas."

To protect that sacred right, the judiciary carefully scrutinizes government regulation to determine if such regulation impermissibly infringes upon it. When legislative or executive action is directed at the content of one's speech, it will pass judicial review only upon a showing that the action is designed to further a compelling governmental interest by narrowly drawn means necessary to achieve the end. See, e.g., Widmar v. Vincent, 454 U.S. 263,270-71(1981).

The First Amendment's guaranty is not absolute, however. See, e.g., Chaplinsky, 315 U.S. at 571. Although the amendment is unconditional on its face, the fact that there were accepted state limits on speech at the time it was ratified indicates that the "phrasing of the First Amendment was not intended to protect every utterance." Roth, 354 U.S. at 483.

This is certainly true about speech on sexual subjects.

Obscene speech has no protection under the First Amendment. See Sable Communications of California, Inc. v. FCC, __U.S.__, 109 S.Ct. 2829,2835(1989); Paris Adult Theatre I v. Slaton, 413 U.S. 49,57(1973); Miller, 413 U.S. at 20; Roth,

354 U.S. at 483; Chaplinsky, 315 U.S. at 571-72. The rationale is simple: the message conveyed by obscene speech is of such slight social value that it is always outweighed by the compelling interests of society, as manifested in the laws enacted by its elected representatives. See, e.g., Chaplinsky, 315 U.S. at 571-72.

Sex has been called "a great and mysterious motive force in human life". Roth, 354 U.S. at 487. Because of its power, both federal and state governments have chosen to regulate its abuse. For example, states have banned prostitution, incest, rape, and other sexually related conduct. These prohibitions are no different that a ban on obscenity. The distinction between regulations of conduct and speech does not invalidate obscenity laws. As noted in Miller v. California, "Sex and nudity may not be exploited without limit by films and pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." 413 U.S. at 25-26.

The state may also have an important interest in

protecting minors and unwilling or sensitive adults from exposure to obscene materials. See Miller, 413 U.S. at 18-19.

The plaintiffs attempt to diminish the state's interest by relying upon language in Butler v. Michigan, 352 U.S. 380(1957), that if materials that are only obscene as to minors are banned, a state's statute would "reduce the adult population...to reading only what is fit for children." Id. at 383. This decision only applies, however, to governmental regulations of materials which are not obscene as to adult audiences. Certainly it is not improper for a state to protect children from materials which are too lewd for even adult consumption.

Words, including musical lyrics, are powerful. As noted in Paris Adult Theatre I,

> [If there is a] well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public

> exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? 413 U.S. at 63.

Even though there is no Constitutional protection for obscenity and there are potential governmental interests at stake, it does not necessarily mean that obscene speech is illegal. Indeed, state governments could legalize obscenity including use by consenting adults. See, e.g., United States v. Twelve 200-Foot Reels of Super 8mm. Film, 413 U.S. 123,129(1973).

The government must first criminalize obscenity before it is outlawed. Indeed, if there were no statutory bans enacted by the legislature, courts would not have to decide what is and what is not obscene.

The U.S. Supreme Court discussed this in United States v. Reidel, 402 U.S. 351,356-57(1971):

> [C]ases have interpreted the First Amendment not to insulate obscenity from statutory regulation. But the Amendment itself neither

> proscribes dealings in obscenity nor directs or suggests legislative oversight in this area. The relevant constitutional issues have arisen in the courts only because law-makers having the exclusive legislative power have consistently insisted on making the distribution of obscenity a crime or otherwise regulating such materials and because the laws they pass are challenged as unconstitutional invasions of free speech and press.

The Florida Legislature has acted, however. It has enacted a statutory scheme outlawing obscenity. It is apparent that this legislation is intended to regulate obscenity to the maximum extent allowed by the Constitution of the United States. Section 847.001(7), Florida Statutes, tracks the language of the controlling case of Miller v. California in defining obscenity for purposes of the state ban. Cf. A Book Named "John Cleland's Memoirs Of A Woman Of Pleasure" v. Attorney General of Massachusetts (Memoirs), 383 U.S. 413,418(1966)

(state statute interpreted by state's highest court as including all works "obscene in the constitutional sense").

The Florida Legislature has enacted a comprehensive set of laws. The primary provision is section 847.011 of the Florida Statutes. Subsection (1)(a) criminalizes the distribution, sale, or production of any obscene thing including a "recording" which can be "transmuted into auditory...representations." Subsection (2) similarly makes it a crime for a person to knowingly have an obscene thing, including musical recordings, in his possession. Section 847.06 and 847.07 make it criminal to transport obscenity into the state or to create, deliver, or publish obscenity. There are several provisions which specifically apply to child pornography. See FLA. STAT. ANN. §§847.012, .0125, .013, .0135, .0145(Supp. 1990). Finally, sections 847.201 and 847.202 prohibit obscene programming on cable television during promotional periods and require ratings on video tapes rented and sold to the public.

An argument underlying the plaintiffs' position is that the obscenity or non-obscenity of any material should not be a

concern of the criminal law, but rather should be left to the free market of ideas. Let each individual member of the public decide whether they wish to buy the material. 2 Live Crew has labeled their work with an explicit warning. They claim this label allows adults who would object to the recording's contents to exercise the consumer's right of free choice to not buy the product. To use the example of television, if the viewer does not like what he sees on Channel X, he may switch to Channel Y or turn off the set. In the case of obscene music, people who do not want to listen to obscenity do not have to buy it.

This is the argument of those absolutists who believe all speech, regardless of its content, is protected by the First Amendment. Such individuals label all regulation of speech as "censorship" and "paternalism". This absolutist view finds strength among those who believe rugged individualism is a valued virtue, if not a protected right that everyone should be permitted to "do their own thing."

This is a facially appealing argument. The problem is that it is not the law.

Florida has declared obscenity to be a crime. To repeat, violation of the laws against obscenity is as much against the law as assault, rape, kidnapping, robbery, or any other form of behavior which the legislature has declared criminal.

The absolutists and other members of the party of Anything Goes should address their petitions to the Florida Legislature, not to this court. If they are sincere let them say what they actually mean--Lets' Legalize Obscenity!

To be redundant, obscenity is not a protected form of speech under the U.S. Constitution, with or without voluntary labeling. It is a crime. If the people of Florida, want to legalize obscenity, they have every right to do so. It is much easier to criticize the law, however, than it is to work to repeal it. As the Supreme Court stated in Paris Adult Theatres I:

> It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an

> individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice--those in politics, religion, and expression of ideas--are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society....
>
> The States, of course, may follow...a "laissez-faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction.

413 U.S. at 63-64(emphasis in original).

This court's role is merely to interpret the law to determine whether the particular material is obscene. If the

inquiry yields an affirmative response, judicial review is limited to whether the means chosen to implement the law are rationally related to the goal of the legislation. It is not the role of this court to sit as a Super-legislature to second-guess whether the best possible law was passed. See Paris Adult Theatre I, 413 U.S. at 64. This court must also refrain from substituting its own choice of the appropriate means to outlaw obscenity, for this is a matter of legislative discretion subject only to the boundaries of the Constitution and the conscience of the legislators. See Kingsley Books, Inc. v. Brown, 354 U.S. 436,441(1957). And if a statute only regulates unprotected obscenity, mere rationality is sufficient to satisfy due process.

In an era where the law and society are rightfully concerned with the rights of minorities, it should not be overlooked nor forgotten that majorities also have rights.

In our democratic form of government, citizens elect representatives to protect their interests and promote their welfare. State legislatures have the authority to exercise the governmental police power which reaches all manner of human

conduct. As already seen, state regulation may reach some of the most intimate aspects of man's existence including sex. Also see Paris Adult Theatre I, 413 U.S. at 68-69("Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment."). When man enters into a society and becomes a member thereof, he necessarily submits to its laws and thereby must give up the unfettered liberty he would otherwise possess in his natural state. See Near v. Minnesota, 283 U.S. 697,707(1931).

In sum, if persons subscribe to the view that obscenity should be legalized, they should take their petitions to Tallahassee, the Florida capital, not to the steps of the U.S. courthouse.

The people of Florida have made obscenity a crime. Individuals are not free to disobey or disregard the law. The law is not a smorgasbord where people are free to pick and choose among which laws they will obey and which they will

reject. Neither is it a channel selector available to every member of the public to use as they deem fit. As noted in the Pattern Instructions of the Eleventh Circuit, jurors in deciding the rights and liberties of their fellow citizens "must...follow the law...whether.....[they] agree with that law or not."

Men and women in good faith may agree or disagree as to whether obscenity should be prohibited. They can argue that the obscenity statutes should or should not be repealed. In the meantime, however, the law must be obeyed and the Sheriff has a duty to enforce it. Indeed, Florida's Legislature has mandated that all sheriffs in the state are to "vigorously enforce" the obscenity laws. See FLA. STAT. ANN. §847.001(9)(Supp. 1990).

THE MILLER V. CALIFORNIA TEST

In deciding whether a specific work is or is not obscene, the court must apply the controlling test enunciated in Miller v. California, 413 U.S. 15(1973). To be obscene, there must be proof of all three of the following factors: (1) the average person, applying contemporary community standards, would find

that the work, taken as a whole, appeals to the prurient interest, (2) measured by contemporary community standards, the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id.; also see Memoirs, 383 U.S. at 419(to be obscene, all three elements must be met and each element must be "independently" evaluated); Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1354,1363(5th Cir. 1980)(same); United States v. Various Articles of Obscene Merchandise, 709 F.2d 132,135(2nd Cir. 1983)(same).

THE RELEVANT COMMUNITY

Both the first and second elements of Miller require application of "contemporary community standards." The issues of the size of the appropriate community, its composition, and the view of the average person in that group are all questions of fact to be decided by the trier of fact, which is the court in this case. See Miller, 413 U.S. at 30.

Both parties apparently assumed that the relevant

community was only Broward County, Florida. Neither litigant presented any evidence to support this assumption, which was apparently based upon the jurisdiction of the Broward County Sheriff and the County lines. However, the boundaries of the relevant community under Miller are a matter for judicial, not legislative, determination. See Smith, 431 U.S. 291, 303(1977).

This court finds that in assessing whether this work is obscene, the relevant community is the area of Palm Beach, Broward, and Dade Counties. In reaching this determination, the court has considered numerous factors. These three adjoining counties share common geography on the eastern coast of Florida. They also share beachfront on the Atlantic Ocean including all the common experiences that derive therefrom including the exposure to tourists. All three counties are open communities in the sense that visitors, from abroad and other states, come to South Florida to vacation and resettle. The area is also linked via common transportation. The three counties are connected by rail (Florida East Coast, Amtrak, and Tri-Rail), water (Atlantic Ocean and the Intracoastal

Waterway), air, and highway (Federal Highway, Florida Turnpike, and Interstate 95). Through these transportation links, the labor forces of Broward and Dade on the one hand, and Broward and Palm Beach on the other, commingle. Each county has targeted media, but the three counties generally share access to the same radio and television stations and newspapers. Culturally, there is also a strong connection. Even though each county has a distinct mix of ethnic peoples, cultural events are advertised to and attended by the residents of all three. Because of the strong transportation ties, the area is also linked economically. Trade and industry in South Florida do not limit their business by county lines. Palm Beach, Broward and Dade also share a similar composition of rural and urban areas, with the larger cities in the eastern portion of each county. Finally, there are political ties. Florida House and Senate Districts include areas within both Broward and Palm Beach. Other State House and Senate Districts include both Broward and Dade Counties. In terms of the federal districts, Congressional District 14 encompasses areas within Broward and

Palm Beach, and District 16 includes both Broward and Dade Counties. The state court systems are also linked. The Fourth Appellate District includes both Broward and Palm Beach. The federal district of the Southern District of Florida includes all three counties. This court's district also includes other counties both north of Palm Beach and south of Dade, but after consideration of all the above factors, it is apparent that these other counties do not share the integral connections that Broward, Dade, and Palm Beach have. For example, the counties of Highlands, Okeechobee, Indian River, St. Lucie, and Martin would appear to be a separate community with only significant ties to Palm Beach, not to Broward or Dade.

If the relevant community is Broward, Dade, and Palm Beach counties, the next step is to determine the composition of the citizens of this area. The court, as the finder of fact, must rely upon its own personal knowledge as the parties failed to present evidence on this point. In a word, this area is remarkable for its diversity. The three counties are a mecca for both the very young and the very old. Because of the beaches

and the moderate year-round climate, this area includes young persons establishing homes and older residents retiring to enjoy life under the sun. There are both families and single individuals residing the communities. Generally, the counties are heterogeneous in terms of religion, class, race, and gender.

THE AVERAGE PERSON STANDARD

The next inquiry is more difficult because this court must determine what are the standards for determining prurient interest and patent offensiveness in Palm Beach, Dade, and Broward Counties. The fact that the state legislature has enacted laws prohibiting obscenity is certainly relevant and entitled to great weight. The state's anti-obscenity stance as a whole, however, is over inclusive because other communities outside the three counties are included in the majority who passed the legislation.

In determining the views of the "average person" in this area, the court has not focused only on the views of the most tolerant or the most sensitive individuals. See Smith v. United States, 431 U.S. at 304-05("the most prudish or the most

tolerant" or "the reactions of a sensitive or of a callous minority"). The "average person" does not necessarily represent any one segment of the community. It is a legal concept whereby a single perspective is derived from the aggregation or average of everyone's attitudes in the area including persons with differing degrees of tolerance. See Pinkus v. United States, 436 U.S. 293,298-302(1978) (community under Miller is made up of all adults in the area including the most sensitive). The court has not considered minors in its considerations because there was not sufficient evidence adduced at trial that the music was targeted at such persons or that it actually reached children.

This court finds that the relevant community standard reflects a more tolerant view of obscene speech than would other communities within the state. This finding of fact is based upon this court's personal knowledge of the community. The undersigned judge has resided in Broward County since 1958. As a practicing attorney, state prosecutor, state circuit judge, and currently, a federal district judge, the undersigned has traveled and worked in Dade, Broward, and Palm Beach. As a

member of the community, he has personal knowledge of this area's demographics, culture, economics, and politics. He has attended public functions and events in all three counties and is aware of the community's concerns as reported in the media and by word of mouth. In almost fourteen years as a state circuit judge, the undersigned gained personal knowledge of the nature of obscenity in the community while viewing dozens, if not hundreds of allegedly obscene films and other publications seized by law enforcement.

The court does not adopt the plaintiffs' position that these three counties can be labeled as "tolerant" per se as opposed to some degree thereof. Neither the trier of fact's personal knowledge nor the plaintiffs' evidence supports such a conclusion. The plaintiffs argue that the lack of written complaints in the Nasty investigation file created by the Broward Sheriff's office is evidence of a tolerant community standard. While this fact is entitled to some weight, it is far from significant. There may be many reasons why concerned citizens have not complained. For example, the Nasty recording was not

released until 1989 and it takes time for even a popular musical release to reach the public consciousness. Although the Sheriff has the duty to enforce the obscenity laws regardless of community protest, Deputy Wichner's explanation of why this particular album was singled out can reasonably be linked to significant community discontent, whether communicated by telephone calls, anonymous messages, or letters to the police. Furthermore, the vast majority of complaints in the file, although not exclusively from Broward County, were residents of the relevant community.

Further, the plaintiffs' reliance upon the admission of other sexually explicit works is also not entitled to great weight in determining community standards. First, the Supreme Court has recognized that this type of evidence does not even have to be considered even if the comparable works have been found to be nonobscene. See Hamling v. United States, 418 U.S. 87,126-127(1974). In this case, there is no evidence that the comparable materials are not themselves obscene. More importantly, most of the materials are simply irrelevant. This

case involves the alleged obscenity of a musical recording. Evidence of depictions of sexual conduct in pictures, moving or still, is not substantially equivalent to musical lyrics.

The most comparable works introduced are the sexually explicit writings in the various books and magazines, the audio tape entitled Raw by Eddie Murphy, and the double cassette tape recording by Andrew Dice Clay. All three of these works focus upon a verbal message analogous to the format in the Nasty recording. The court does give these particular works some weight.

The plaintiffs also raise several collateral arguments as to why this court is allegedly unable to determine the community standards. They claim that the defendant's failure to introduce evidence at the trial including expert testimony is fatal. The plaintiffs also allege that this court's opinion will only reflect the personal opinion of the undersigned judge, not the relevant community. They support this argument by pointing to the court's alleged refusal to empanel a jury in this case.

Dealing with the last contention first, the plaintiffs'

argument on the lack of a jury is disingenuous. First, the plaintiffs filed this action in federal court and only requested equitable relief without any right to a trial by jury. Second, there is no Constitutional right to trial by jury in obscenity cases. See Alexander v. Virginia, 413 U.S. 836(1973). Finally, neither party agreed to trial by jury. If both parties consent, Federal Rule 39(c) allows a court to empanel a jury whose verdict would have the same binding effect as if trial by jury was a matter of right. The provision also allows for use of an advisory jury whose verdict is not binding on the court. The defendant Navarro only consented to an advisory jury. The plaintiffs conditioned their consent to any form of a jury upon the court's ruling on another motion before the court. In that motion, the plaintiffs advanced the argument that this court should impose a standard of proof more demanding than a preponderance of the evidence upon the defendant on the obscenity issue. Such a request was without merit. This is a civil, not a criminal case, and hence does not require proof by clear and convincing evidence or, proof beyond a reasonable doubt. The plaintiffs

would agree to an advisory jury only if this court required a standard of clear and convincing evidence. Even if the court had used an advisory jury, the verdict of six other citizens on the issue of community standards would have been of doubtful value. The individuals would have only been Broward County residents. Moreover, this court, as demonstrated, has sufficient personal knowledge of the community and its standards to make a decision in this case.

The plaintiffs' claim that this court cannot decide this case without expert testimony and the introduction of specific evidence on community standards is also without merit. The law does not require expert testimony in an obscenity case. The defendant introduced the Nasty recording into evidence. As noted by the Supreme Court in Paris Adult Theatre I, when the material in question is not directed to a "bizarre, deviant group" not within the experience of the average person, the best evidence is the material, which "can and does speak for itself." Paris Adult Theatre I, 413 U.S. at 56 & n.6.

In deciding this case, the court's decision is not based

upon the undersigned judge's personal opinion as to the obscenity of the work, but is an application of the law to the facts based upon the trier of fact's personal knowledge of community standards. In other words, even if the undersigned judge would not find As Nasty As They Wanna Be obscene, he would be compelled to do so if the community's standards so required.

The true basis of the plaintiffs' argument is that the legal standard of the "community" and the "average person" are too nebulous to apply to an issue of constitutional law. This position ignores the fact that the law does not require absolute certainty as to its determinations. The standard of proof is adjusted upward or downward to reflect the balance between the competing rights of individuals and society. In civil cases, the law gives effect to a determination based on a preponderance of the evidence. Even in criminal matters where a person can lose his liberty, property, and even his life, there is no requirement that the government prove guilt beyond all possible doubt. As noted in Hamling v. United States, 418 U.S. 87,101(1974), "[I]t

is common experience that different juries may reach different results...This is one of the consequences we accept under our jury system." The same holds true when the court is the finder of fact in a bench trial. Application of the "community" and "average person" standards are no different than that of applying the standard of the "reasonable person" used in negligence and tort law. See Pinkus v. United States, 436 U.S. 293,300-01(1978); Smith, 431 U.S. at 308.

THE FIRST MILLER TEST: PRURIENT INTEREST

This court finds, as a matter of fact, that the recording As Nasty As They Wanna Be appeals to the prurient interest. The Supreme Court has defined prurient as "material having a tendency to excite lustful thoughts." Roth, 354 U.S. at 487 n. 20. Appeals only to "normal, healthy sexual desires" are not adequate to meet the test. Brockett v. Spokane Arcades, Inc., 472 U.S. 491,498(1985). The material must exhibit a "shameful or morbid interest in nudity, sex, or excretion". Id. (readopting definition in Roth, 354 U.S. at 487 n. 20).

Nasty appeals to the prurient interest for several reasons.

First, its lyrics and the titles of its songs are replete with references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning. Florida's Legislature has provided a valuable source of evidence in the form of its obscenity statutes for determining what is sexual conduct. The initial provision is section 847.001(11), Florida Statutes, which defines "sexual conduct" to include "actual or simulated sexual intercourse, deviate sexual intercourse,...masturbation,...sadomasochistic abuse; [or] actual lewd exhibition of the genitals"." Section 847.001(2), Florida Statutes, defines deviate sexual intercourse as sexual conduct between unmarried persons involving contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva. Section 847.001(8) defines sadomasochistic abuse as satisfaction from sadistic violence derived by inflicting harm upon another. These definitions cover most, if not all, of the sexual acts depicted in <u>As Nasty As They Wanna Be</u>.

Furthermore, the frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into this activity. The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films.

It is also noteworthy that the material here is music. It is true that it would be difficult, albeit not impossible, to find that mere sound without lyrics is obscene. Music is sufficiently subjective that reasonable persons could disagree as to its meaning. But, the focus of the Nasty recording is its lyrics. Based on the evidence at trial, music of the "rap" genre focuses upon verbal messages accentuated by a strong beat. 2 Live Crew itself testified that the Nasty recording was made to be listened and danced to. The evident goal of this particular recording is to reproduce the sexual act through musical lyrics. It is an appeal directed to "dirty" thoughts and the loins, not to the intellect and the mind.

The court has also given some, but not great, weight to

the plaintiffs' commercial motive. Of course, the fact that the plaintiffs made a profit from the public distribution of the Nasty recording is not relevant in determining obscenity. See Ginzburg v. United States, 383 U.S. 463,474(1966). However, the court can consider the manner in which the material was distributed and promoted to determine if the "leer of the sensualist" permeates the work. Id. at 465-66,468,475-76. In Ginzburg, the court found that publishers of certain magazines and books had directed their advertising in such a way as to commercially exploit erotica solely for the sake of their prurient appeal. Id. at 466. For example, the advertisements sent to potential customers "stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded [as] an unrestricted license allowed by law in the expression of sex and sexual matters." Id. at 469. The Court went on to note that, "the deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." Id.

at 470.

Consideration of the creator's intent to appeal to the prurient interest is still a valid consideration today, even after Miller v. California. See Splawn v. California, 431 U.S. 595(1977); Pinkus, 436 U.S. 293(1978).

The record at trial indicates that the plaintiffs' commercial exploitation of this work was done in a manner calculated to make a salacious appeal. The title of the recording, As Nasty As They Want To Be, in addition to the names of many of the songs and the illustration on the recordings' insert certainly fit within the confines of the Ginzburg case for materials "look[ing] for titillation."

One of the more interesting points suggested by the evidence at trial, but not dwelt on by the defendant, was that 2 Live Crew made two apparently identical albums with the only difference being the sexually explicit lyrics. The plaintiffs' own expert, John Leland, testified that the Nasty recording, without the salacious lyrics, would not have been expected to sell more than 500,000 copies nationwide. To date, the Nasty version has

sold 1.7 million copies. The identical recording sans sexual lyrics (Clean) has sold only 250,000 copies. The difference between the actual sales of the two recordings can reasonably be found to have been motivated by the "leer of the sensualist". The plaintiffs cannot claim they needed the vulgar lyrics to promote their message since the plaintiffs' own experts testified that music from neither the "rap" or "hip-hop" genre does not require the use of such language.

Finally, the plaintiffs rely upon testimony, both lay and expert, that the Nasty recording did not actually physically excite anyone who heard it and indeed, caused boredom after repeated play. However, based on the graphic deluge of sexual lyrics about nudity and sexual conduct, this court has no difficulty in finding that As Nasty As They Wanna Be appeals to a shameful and morbid interest in sex.

THE SECOND MILLER TEST: PATENTLY OFFENSIVE

The court also finds that the second element of the Miller test is satisfied in that the Nasty recording is patently offensive. This is a question of fact, which must be measured by

contemporary community standards. See Miller, 413 U.S. at 30.

It is quite true that not all speech with sex as its topic is obscene. See Roth, 354 U.S. at 487. The As Nasty As They Wanna Be recording is another matter.

The recording depicts sexual conduct in graphic detail. The specificity of the descriptions makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sex acts. Furthermore, the frequency of the sexual lyrics must also be considered. With the exception of part B on Side 1, the entire Nasty recording is replete with explicit sexual lyrics. This is not a case of subtle references or innuendo, nor is it just "one particular scurrilous epithet" as in Cohen v. California, 403 U.S. 15,22(1971).

As already noted, Florida's Legislature has defined obscene acts to include sadomasochistic sexual conduct, oral sex, and anal intercourse. See FLA. STAT. ANN. §§847.001(2), .001(8)(Supp. 1990). In addition, Florida's obscenity statutes are intended to have the broadest, constitutional scope. See FLA. STAT. ANN. §847.001(7)(Supp. 1990). States may outlaw

certain portrayals of sexual conduct and nudity if they constitute "hardcore pornography." See Jenkins v. Georgia, 417 U.S. 153(1974). In Jenkins, the Supreme Court reversed a conviction for distribution of the film "Carnal Knowledge" which contained scenes of a woman with a bare midriff and several lovemaking sessions. Id. at 161. This depiction was held by the Court to not be within the hardcore category. As noted by the Court:

> While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. They are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards. Id. at 161.

In Miller, the Supreme Court gave two examples of the

type of conduct subject to state regulation: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Id., 413 U.S. at 25. The conduct described in the Nasty recording is certainly within the scope of the Florida statutes. The state law, of course, is not dispositive on the question of whether this particular community would be patently offended, but it is entitled to significant weight. Smith, 431 U.S. at 307-08.

While the above facts are sufficient to support a finding that this material is patently offensive, there are additional considerations that support such a finding. First, the Nasty lyrics contain what are commonly known as "dirty words" and depictions of female abuse and violence. It is likely that these offensive descriptions would not of themselves be sufficient to find the recording obscene. See, e.g., American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (sexual subordination of women); New Jersey v. Rosenfeld, 62 N.J. 594;

303 A.2d 889 (Sup. Ct. 1973) (after remand for consideration by U.S. Supreme Court in light of Cohen v. California, state court acknowledged that the use of public profanity, if not rising to the level of fighting words, was constitutionally protected). When these terms are used with explicit sexual descriptions, however, they may be considered on the issue of patent offensiveness. Secondly, the material here is music which can certainly be more intrusive to the unwilling listener than other forms of communication. Unlike a video tape, a book, or a periodical, music must be played to be experienced. A person can sit in public and look at an obscene magazine without unduly intruding upon another's privacy; but, even according to the plaintiffs' testimony, music is made to be played and listened to. A person laying on a public beach, sitting in a public park, walking down the street, or sitting in his automobile waiting for the light to change is, in a sense, a captive audience. While the law does require citizens to avert their ears when speech is merely offensive, they do not have an obligation to buy and use ear plugs in public if the state legislature has chosen to protect

them from obscenity.

Finally, in determining whether the Nasty recording is patently offensive, it is again proper to consider the plaintiffs' commercial exploitation of sex to promote sales. As noted by the Supreme Court in Ginzburg v. United States, 383 U.S. 463,470(1966), representations of a publication as erotically arousing "would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such as appeal heightens the offensiveness of the publications to those who are offended by such material." Such is the case here, as already discussed. Again, while this factor has not been given great weight, it is entitled to consideration.

THE THIRD MILLER TEST: SOCIAL VALUE

The final factor under Miller is whether the Nasty recording, taken as a whole, lacks serious literary, artistic, political, or scientific value. This factor is not measured by community standards. The proper inquiry is whether a reasonable person would find serious social value in the material at issue. See Pope v. Illinois, ___U.S.___, 107 S.Ct. 1918,

1921(1987). The plaintiffs correctly note that the value of a work can pass muster under Miller if it has serious merit, measured objectively, even if a majority of the community would not agree.

As a preliminary matter, it is again important to note what this case is not about. Neither the "Rap" or "Hip-Hop" musical genres are on trial. The narrow issue before this court is whether the recording entitled As Nasty As They Wanna Be is legally obscene.

This is also not a case about whether the group 2 Live Crew or any of its other music is obscene. The third element of the Miller test focuses upon the social value of the particular work, not its creators. The fact that individuals of whom we approve hold objectionable ideas or that people of whom we do not approve hold worthy ideas does not affect judicial review of the value of the ideas themselves.

The Phillistines are not always wrong, nor are the guardians of the First Amendment always right.

This court must examine the Nasty recording for its

content; the inquiry is objective, not as hominem.

Finally, this court's role is not to serve as a censor or an art and music critic. If the Nasty recording has serious literary, artistic, political, or scientific value, it is irrelevant that the work is not stylish, tasteful, or even popular.

The plaintiffs themselves testified that neither their music nor their lyrics were created to convey a political message.

The only witness testifying at trial that there was political content in the Nasty recording was Carlton Long, who was qualified as an expert on the culture of black Americans. This witness first stated that the recording was political because the 2 Live Crew, as a group of black Americans, used this medium to express themselves. While it is doubtless true that Nasty is a product of the group's background, including their heritage as black Americans, this fact does not convert whatever they say, or sing, into political speech. Professor Long also testified that the following passages from the recording contained political content: a four sentence phrase in the song "Dirty Nursery Rhymes" about Abraham Lincoln, the word "man" in the

Georgie Porgie portion of the same song, and the use of the device of "boasting" to stress one's manhood. Even giving these isolated lyrics the meaning attributed by the expert, they are not sufficient in number or significance to give the Nasty recording, as a whole, any serious political value.

In terms of science, Professor Long also suggested that there is cultural content in 2 Live Crew's recording which rises to the level of serious sociological value. According to this witness, white Americans "hear" the Nasty recording in a different way than black Americans because of their different frames of references. Long identifies three cultural devices evident in the work here: "call and response", "doing the dozens", and "boasting". The court finds none of these arguments persuasive.

The only examples of "call and response" in the Nasty recording are portions where males and females yell, in repetitive verse, "Tastes Great--Less Filling" and, in another song, assail campus Greek-letter group. The phrases alone have no significant artistic merit nor are they examples of black

American culture. In the case of "Tastes Great--Less Filling", this is merely a phrase lifted from a beer commercial.

The device of "doing the dozens" is a word game composed of a series of insults escalating in their satirical content. The "boasting" device is a way for persons to overstate their virtues such as sexual prowess.

While this court does not doubt that both "boasting" and "doing the dozens" are found in the culture of black Americans, these devices are also found in other cultures. "Doing the dozens" is commonly seen in adolescents, especially boys, of all races. "Boasting" seems to be part of the universal human condition.

Professor Long also cited to several different examples of literary devices such as rhyme and allusion which appear in Nasty, and points to the song title "Dick Almighty" as an example of the literary device of personification. This, of course, is nonsense regardless of the expert's credentials. "A quotation from Voltaire in the fly leaf of a book", noted the Supreme Court in Miller, "will not constitutionally redeem an

otherwise obscene publication." 413 U.S. at 25 n.7(quoting Kois v. Wisconsin, 408 U.S. 229,231(1972)).

Prior to Miller, the government had to demonstrate that a work was utterly without redeeming social value to be judged obscene. See Memoirs, 383 U.S. at 419. The present test is less stringent, only requiring proof of an absence of serious social worth. This leads to the plaintiffs's strongest argument: that the Nasty recording has serious artistic value. This category of social worth is broad enough to include the value contributed by the political, literary, and cultural aspects of the particular work.

The plaintiffs stress that the Nasty recording has value as comedy and satire. Certainly, people can and do laugh at obscenity. The plaintiffs point to the audience reaction at trial when the subject recording was played in open court. The audience giggled initially, but the court observed that after the initial titillation, it fell silent.

In a society where obscenity is forbidden, it is human nature to want to taste forbidden fruit. It is quite another thing to say that this aspect of humanity forms the basis for finding

that Nasty has serious artistic value. Furthermore, laughter can express much more than enjoyment and entertainment. It is also a means of hiding embarrassment, concealing shame, and releasing tension. The fact that laughter was only heard at the time that the first song of the tape was played is probative on what the audience's outbursts really meant. It cannot be reasonably argued that the violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and microscopic descriptions of human genitalia contained on this recording are comedic art.

The Nasty recording is not comedy, but is first and foremost, music. Initially, it would appear very difficult to find a musical work obscene. As noted by the American Civil Liberties Union, the meaning of music is subjective and subject only to the limits of the listener's imagination. See ACLU Brief at 3.

Music nevertheless is not exempt from a state's obscenity statutes. Musical works are obscene if they meet the Miller test. Certainly it would be possible to compose an obscene oratory or

opera and it has probably been done.

The plaintiffs claim that this case is novel since it seeks to determine whether music can be obscene. The particular work here, although belonging to the general category of music, however, is to be distinguished from a purely instrumental work, or other more common recordings with a fairly equal emphasis on music and lyrics. The focus of the Nasty recording is predominately on the lyrics. Expert testimony at trial indicates that a central characteristic of "rap" music is its emphasis on the verbal message. Rhythm is stressed over melody, not for its own sake, but to accentuate the words of the song. The pounding beat and the presence of near continuous lyrics support this conclusion. 2 Live Crew's music is explicitly clear as to its message. Although music and lyrics must be considered jointly, it does not significantly alter the message of the Nasty recording to reduce it to a written transcription. The Supreme Court's decision in Kaplan v. California, 413 U.S. 115(1973), is applicable here. The Court held that an expression by words alone, albeit in a written form, can be legally obscene even if

there are no accompanying pictorial depictions. Id. at 118-119. The case at bar is an extension of the law to the extent that words, as lyrics in music, can be obscene.

The key to judging the Nasty recording is to consider it as a whole. 2 Live Crew has "borrowed" components called "riffs" from other artists. Taking the work in its entirety, the several riffs do not lift Nasty to the level of a serious artistic work. Once the riffs are removed, all that remains is the rhythm and the explicit sexual lyrics which are utterly without any redeeming social value.

Obscenity is not a required element for socially valuable "rap" or "hip-hop" music. 2 Live Crew itself proved this point by the creation of its Clean recording.

The court is reminded of a story by Charles Baudelaire, a poet who also had problems with the civil authorities of his day. In My Heart Laid Bare (Vanguard Press 1951), at pages 203-04, he writes:

> All the imbeciles of the Bourgeoisie who intentionally use the words, "immoral",

> "immorality", "morality in art" and other such stupid expressions remind me of Louise Villdieu, a five-franc whore who once went with me to the Louvre. She has never been there before, and began to blush and cover her fact with her hands, repeatedly plucking at my sleeve and asking me, as we stood before deathless statutes and pictures, how such indecencies could be flaunted in public.

One of the plaintiffs' expert witnesses testified at trial that material is art if it causes a reaction in the audience perceiving it. If that reaction is an appeal to the prurient interest in a patently offensive way, and if the material lacks serious literary, artistic, political or scientific, the law does not call that art--it calls it obscenity and when so proven beyond a reasonable doubt is a crime in Florida.

OBSCENITY? YES!

The recording As Nasty As They Wanna Be, taken as a whole, is legally obscene.

The court so finds by a preponderance of the evidence although the standard of proof presents no real issue.

The court also finds As Nasty As They Wanna Be to be legally obscene under the Miller test by clear and convincing evidence, which standard the plaintiffs maintain is the correct burden of proof.

PRIOR RESTRAINT AND PROCEDURAL DUE PROCESS

A prior restraint can be generally defined as any condition imposed by the government on the publication of speech. See, e.g., Times Film Corp. v. City of Chicago, 365 U.S. 43,55 n.2(1961)(Warren, C.J., dissenting). Such a limitation can come in varying forms including permit requirements, licensing taxes, registration, prepublication submission of materials, seizures, and judicial injunctions. The distinguishing characteristic of a prior restraint is that the condition vests power in a nonjudicial official to make the final decision as to whether speech will be permitted at all or in what form. See e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546,556-57(1975); Freedman v. Maryland, 380 U.S. 51,58(1965).

Prior restraints are repugnant to the right of free speech. The First Amendment prohibits this type of regulation to minimize the risk of governmental censorship. Many forms of speech are of value because of the urgency and immediacy of the idea expressed. Even if a censor ultimately allows publication, significant delay in the decision making process can destroy the fleeting value of the speech. See, e.g., Southeastern Promotions, 420 U.S. at 562(use of a theater). If speech is delayed or denied, the rights of both the speaker and his audience are impaired and society is the ultimate "loser." See Dombrowski v. Pfister, 380 U.S. 479,486(1965); also see Marcus v. Search Warrants of Property, 367 U.S. 717,736(1961); Quantity of Copies of Books v. Kansas, 378 U.S. 206,214(1964). Furthermore, if allowed, prior restraints necessarily legitimatize the existence of a censor. The danger is that officials, even if originally well-intentioned, may be driven to suppress an ever growing amount of speech.

For all of these reasons, the First Amendment casts a jaundiced eye on any form of prior restraint. But, as with the

right of free speech itself, this prohibition is not absolute. A limitation on speech prior to its publication may withstand constitutional scrutiny in "exceptional cases." Near v. Minnesota, 283 U.S. 697,715-16(1931); also see Southeastern Promotions, 420 U.S. at 559. Included within this category are all types of speech unprotected by the Constitution such as obscenity. Near, 283 U.S. at 716.

The fact that the government may prevent obscene materials from ever reaching their intended audience assumes that the issue of obscenity has already been decided. It is the courts and not nonjudicial officials who must decide whether a specific work is obscene. See United States v. Thirty-Seven Photographs, 402 U.S. 363,370-71(1971). Interpreting obscenity laws requires "appraisal of facts, the exercise of judgment, and the formation of an opinion"; in other words, the exercise of judicial power. See Southeastern Promotions, 420 U.S. at 554-55(citation omitted); Staub v. Baxley, 355 U.S. 313,323(1958)(same); also see Thirty-Seven Photographs, 402 U.S. at 370-71("determinations of obscenity should be left to

courts and juries."). Because the line between free speech and obscenity is so subtle, the law imposes a presumption that all utterances are constitutionally protected until there is a judicial decision to the contrary. See, e.g., Fort Wayne Books, Inc. v. Indiana, ___U.S.___, 109 S.Ct. 916,927(1989); Heller v. New York, 413 U.S. 483,491(1973).

Because of this presumption, the state must follow constitutionally mandated procedures in seizing obscene works. The state may criminalize obscenity, but its regulation must comport with the minimum procedural safeguards required by due process. To trigger the Fourteenth Amendment's application, the state regulation must constitute a deprivation of a protected interest. Florida law provides that no property interest exists in obscene materials. See FLA. STAT. ANN. §847.011(7)(Supp. 1990). In essence, this state has made obscenity a form of contraband, the seizure of which would not normally implicate the Fourteenth Amendment. However, because free speech has an independent source of protection under the First Amendment as a constitutional "liberty",

arguably obscene articles are not treated by the law like other contraband such as illegal drugs. See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319,326 n.5(1979); Roaden v. Kentucky, 413 U.S. 496,501-03(1973); Quantity of Books, 378 U.S. at 211-12; Marcus v. Search Warrants of Property, 367 U.S. 717, 730-31(1961); Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353,1359(5th Cir. 1980)("There must be some judicial determination of obscenity before a seizure or "constructive seizure" may occur.")(citation omitted). Although it has been assumed to this point, music is clearly a form of expression within the scope of the free speech guaranty and thereby entitled to the presumption of constitutionality as a form of "liberty" protected under the Fourteenth Amendment. Cf. Southeastern Promotions, 420 U.S. at 557-58(theater is form of speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495,501-02(1952)(motion picture film is form of speech).

NASTY SUPPRESSION

The remaining issues are whether the defendant's actions in this case constituted a Fourteenth Amendment deprivation

and prior restraint and, if so, whether the accompanying procedures were adequate to comport with due process and the First Amendment.

Deputy Wichner's initial purchase of Nasty at Sound Warehouse was neither a prior restraint nor a constitutional deprivation. See Maryland v. Macon, 472 U.S. 463(1985). Moreover, his impulse to seek judicial guidance was equally proper. Prior to any seizure of arguably obscene materials, there must be a minimum of an ex parte hearing before a judicial officer to determine if probable cause exists. See Marcus, 367 U.S. 717(1961); Roaden, 413 U.S. at 504 n.5.

Judge Grossman's review of the probable cause application was also the type of "searching inquiry" demanded by the Constitution prior to a seizure. See Marcus, 367 U.S. at 732. He reviewed the Nasty recording "in its entirety" and had the transcript of six of the songs to review. His decision took several days and he requested additional information from the deputy about the location and accessibility of the purchased tape. This is not a case where the probable cause finding was

based solely upon a policeman's subjective conclusion that Nasty was obscene. See Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636(1968).

It is at this point that the facts of this case become unusual or, in the prior words of this court, "bizarre." The state court judge issued an order finding probable cause that Nasty was obscene. Why this order was entered is unclear. There is no statutory or common law basis for such a procedure. There was no case or controversy before that court as the only party was Deputy Wichner. Nor did Wichner seek an injunctive remedy, or a warrant to search for or to seize suspected obscene materials. What he apparently sought was a legal opinion, and in this he was successful. This is unusual since the giving of legal advice is normally the function of lawyers--not judges.

Nonetheless, the order of probable cause issued. The Broward County Sheriff's office then copied and distributed Judge Grossman's order to the retail music stores in the county which were selling Nasty. The result was predictable. The store managers, as law abiding citizens pulled the recording from their

shelves. Individuals confronted with the threat of arrest by law enforcement officers and presented with a court's order can be expected to do as they are told. Courts declare the law through their orders and all citizens are conscious of our duty to obey the law.

Despite his arguments to the contrary, the Sheriff's actions in this case constituted a seizure of presumptively protected speech within the scope of the First and Fourteenth Amendments.

The First Amendment rights of 2 Live Crew and the music store owners to publish the recording and the public's rights as an audience were all infringed. Even though the defendant is correct that there was no physical transfer of possession of the Nasty inventories, the notion of a seizure for prior restraint purposes encompasses the conduct here. Whether the seizure is called "constructive" or "actual", there was a direct relationship between the sheriffs' visits and the surrounding publicity on the one hand, and the store operators' decision to remove Nasty from their shelves on the other.

The "common thread" of the law is that when an arguably protected work clothed in the presumption of constitutional free speech is removed from public distribution, the state has imposed a prior restraint. See Roaden, 413 U.S. at 504-05(1973); Cf. Mishkin v. New York, 383 U.S. 502,513(1966)(Court refused to reach issue of seizure's legality because record inadequate on the quantity of books seized and whether they were "on the threshold of dissemination.").

The final decision of whether As Nasty As They Wanna Be should be published was left in the nonjudicial hands of the Broward County Sheriff's office. See Southeastern Promotions, 420 U.S. at 556-57("denying use of the municipal facility...constituted the prior restraint. That restraint was final. It was no mere temporary bar while necessary judicial proceedings were under way."). Although the music store operators were the immediate parties who stopped distributing the recording, they so acted only after the police visits and the delivery of the court's probable cause order. Had the deputies only given advice to aid compliance with the law (without also

threatening arrest while presenting a judicial order of probable cause) and had the store operators decided to accept the advice and remove the recording from their inventory, this would be a different case. As noted in Fort Wayne Books, Inc. v. Sullivan, 109 S.Ct. 916(1963), "The mere assertion of some possible self-censorship...is not enough to render an anti-obscenity law unconstitutional." Id. at 926. Indeed, law enforcement officers also have a right of free speech, which citizens are at liberty to disagree with if they believe the police have misstated the law. Justice John Harlan stated in Bantam Books, Inc. v. Sullivan, that "'Bearing the discomfiture and cost' even of 'a prosecution for crime [though] by an innocent person is one of the painful obligations of citizenship." 372 U.S. at 82(dissenting opinion)(citation omitted).

The argument that no other musical works were banned and that the sheriffs' visits did not otherwise disrupt business in the stores is of no consequence. The material issue in this case is that there was a county wide seizure of As Nasty As They Wanna Be. Every single copy of this recording was removed

from the shelves of approximately forty stores. Because of the vulnerability of First Amendment rights, the seizure of even a single copy of one work is constitutionally significant. See Heller v. New York, 413 U.S. 483(1973)(if seizure of a single work prior to trial will deprive the public of the sole copy, the police must make and return a copy for pretrial publication or return the original).

The facts here are also materially similar to the situations presented by the cases of Bantam Books, Inc. v. Sullivan, 372 U.S. 58(1963), Penthouse International, Ltd. v. McAuliffe, 610 F. 2d 1354(5th Cir. 1980), and Council for Periodical Distributors Association v. Evans, 643 F.Supp. 552(M.D.Ala. 1986), aff'd, 827 F2d 1483(11th Cir. 1987). In each case the courts found that the conduct of the governmental officials constituted an unconstitutional prior restraint.

In Bantam Books, an administrative commission created under state law was given authority to review books and magazines. The commission circulated blacklists of publications believed by them to be objectionable for sale to minors. The

lists were sent on official stationery with a reminder that the commission had a legal duty to recommend prosecutions for obscenity law violations to the state Attorney General. Upon receiving the notices, publishers stopped selling the listed items. Police officers conducted follow-up visits to oversee compliance. 372 U.S. at 61-63. The Supreme court finding this process to be a prior restraint, said:

> People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around...The commission's notices phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications...It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity. Id. at

68-69(emphasis added) (footnote omitted).

The same result was reached in this Circuit. In the Penthouse case, Georgia's Solicitor General used a scheme of media announcements, visits to retailers, and warrantless arrests to ban the sale of sexual publications without instituting judicial proceedings for a final determination of the issue of obscenity. 610 F.2d at 1355-58. In Evans, a county district attorney pursued a two-tiered approach. To persuade a distributor to stop selling objectionable works, the attorney warned that further sales would result in the institution of criminal and nuisance proceedings. The distributor withdrew his prior opposition to the district attorney's demands and signed a consent decree banning all future sales of the listed items. On the retail level, the district attorney informed all store owners that they should attend a meeting at the county courthouse. He "strongly suggested" that all sales of specified publications should stop or he would begin arrests. 642 F.Supp. at 554-57.

The defendant attempts to distinguish Bantam Books, Penthouse, and Evans by arguing that in those three cases there

was a lack of judicial involvement unlike the probable cause order here. Further, Navarro argues that those visits were made for the stated purpose of intimidating distributors to stop selling objectionable works whereas the efforts of his deputies were all in good faith. The first alleged distinction is unpersuasive because, as already discussed, the order of probable cause was of no legal effect. Further, by publicizing the order, the sheriffs' office gave an apparent, albeit misleading, judicial endorsement to their threats of arrest. Further, as also noted previously, the good faith of the deputies is not controlling if the effect of their actions was to impose a prior restraint on presumptively protected speech.

THE LACK OF SENSITIVE TOOLS

Because obscenity is an appropriate subject for state regulation, there is no absolute right to be free from all prior restraints. Near, 283 U.S. at 716. To determine whether the Nasty ban was an impermissible prior restraint or merely a valid regulation of unprotected obscenity depends on the facts of the case. See Kingsley Books, Inc. v. Brown, 354 U.S. 436,441-

42(1957).

The standard is whether the procedures required by the state are sufficient to guarantee a speedy and correct determination of a work's obscenity; and whether the safeguards are sufficient to reasonably minimize the risk that nonobscene speech will be suppressed. The Supreme Court observed the need for procedural safeguards in Marcus v. Search Warrants of Property, 367 U.S. 717(1961): "'[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn...The separation of legitimate from illegitimate speech calls for ...sensitive tools.'" Id. at 731(citation omitted). As further noted by the Court in Bantam Books, Inc. v. Sullivan, 372 U.S. 58(1963):

> [T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from

> obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards...is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. Id. at 66.

The only procedural protections accompanying the ban of As Nasty As They Wanna Be were an ex parte application to a state judge for an order of probable cause and the fact of the order itself finding that there was probable cause to believe Nasty was obscene.

These two procedures were clearly insufficient to meet the minimum requirements of due process. The result was that Nasty was subjected to an unconstitutional prior restraint and the plaintiffs' rights to publish presumptively protected speech

were left twisting in the chilling wind of censorship.

The Supreme Court's decision in Freedman v. Maryland, 380 U.S. 51(1965), reaffirmed the minimum procedural safeguards necessary for a prior restraint to pass due process scrutiny. Also see Southeastern Promotions, 420 U.S. at 559-60; Universal Amusement Co., Inc. v. Vance, 445 U.S. 308,317(1980) (Freedman applies to judicial orders which impose prior restraint). There are three basic requirements:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured. Southeastern Promotions, 420 U.S. at 560 (emphasis in original).

By pretrial motion, the defendant accepted the burden of

proving that Nasty was unprotected speech because it is obscene. As to all the other Freedman safeguards, however, the defendant's conduct fell woefully short of legal and constitutional requirements.

First, the Sheriff did not institute judicial proceedings after threatening the music store operators and distributing Judge Grossman's order. The visits occurred on or about March 9, 1990. It was not until March 27, 1990, eighteen days later that the defendant finally filed an action in state court.

The defendant noted at the preliminary injunction hearing (April 19, 1990) and at trial (May 14 and 15, 1990) that he was preparing guidelines for the future application of this enforcement technique which would assure that judicial proceedings are promptly initiated. Even after trial, however, there is still no evidence that such rules have been developed and implemented. This is simply intolerable; nor would such future guidelines have any relevance to the Sheriff's conduct in this case.

The defendant's action in this case suffers from the same

constitutional infirmity as seen in Blount v. Rizzi, 400 U.S. 410(1971): total discretion in a nonjudicial officer to initiate judicial proceedings after a final decision suppressing arguably obscene materials. In Blount, the Postmaster General could intercept suspected obscene mail and hold it for an indefinite time period without any mandatory requirement that he invoke judicial review. Here, the first application for judicial review occurred when the plaintiffs--not the Sheriff--filed this lawsuit.

It is well-established that prior restraints vesting unbridled discretion in nonjudicial officials, thereby making their suppression decision final, in effect, are constitutionally unacceptable. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147,151,1534(1969); Staub v. City of Baxley, 355 U.S. 313(1958); Kunz v. New York, 340 U.S. 290(1951).

Why the defendant chose to pursue this type of prior restraint is not clear. Had the Sheriff's office initiated a criminal prosecution, the Freedman problems might not have arisen because of the rigorous procedures inherent in criminal proceedings. See Times Film Corp. v. City of Chicago, 365 U.S.

43,82-84(1961) (Douglas, J., dissenting). Further, Florida's Legislature has provided a civil remedy in the form of an injunction. See FLA. STAT. ANN. §847.011(8)(Supp. 1990). Because this statute tracks the procedures found constitutionally sufficient in Kingsley Books, Inc. v. Brown, 354 U.S. 437(1957), there would have been no constitutional objection. It is not the duty of this court to dictate to state officials which means are most appropriate to regulate obscenity. See Freedman, 380 U.S. at 60; Kingsley, 354 U.S. at 441. But, this court must intervene when that choice impermissibly infringes upon the First Amendment.

Second, the prior restraint imposed on Nasty was not limited "for only a specified brief period" or restricted to "the purpose of preserving the status quo." Rather, the ban initiated by the visits and the presentation of the probable cause order when combined with the threat of future prosecution was designed to indefinitely suppress the recording. Indeed, Deputy Wichner testified that the Sheriff's office had no plans for future action because there were no further citizen complaints or

evidence of sales in the county.

This case is distinguishable from Heller v. New York, 413 U.S. 483(1973). There, the issue was whether a judge who views a film and finds it obscene can then issue a constitutionally valid warrant for the film's seizure as evidence for trial. The Court held that the seizure of one copy for the bona fide purpose of preserving it as evidence was constitutionally permissible. However, the Court also noted that its holding was limited to cases where there was more than one copy of the film. If there was only a single copy, the government must preserve the status quo by allowing a copy to be made or the original must be returned to allow pretrial publication. Id., 413 U.S. at 492-93. The status quo for presumptively protected speech is that it remains available to the public. Where the government seizes more than a single copy for evidentiary purposes, however, the constitutional risks are much greater. As noted in Heller, "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona

fide purpose of preserving it for evidence in a criminal proceeding." Id. at 492(emphasis added). The same judicial condemnation of facts materially similar to this case was made in Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1354(5th Cir. 1980):

> [T]he procedure adopted and enforced by McAuliffe was much more dramatic and devastating than the mere seizure of one film to be used as evidence. Instead, it resulted in the "constructive seizure" of every magazine in Fulton County, Georgia, that McAuliffe deemed to be obscene. Id. at 1362.

Indeed, the facts of this case demonstrate just how dramatically informal censorship can impair the First Amendment. With relative ease, every copy of Nasty in Broward County was suppressed within days of the deputies' action. The music store operators understandably chose to obey the law as stated in the probable cause order thereby avoiding possible arrest. They also had a strong economic incentive to

remove this single recording from their shelves rather than risk the expense of possible litigation. See Freedman, 380 U.S. at 59-60; Manual Enterprises, Inc. v. Day, 370 U.S. 478,493(1962).

The defendant claims that the initiation of formal proceedings would have been overaggressive. But, as the Supreme Court has taught, the harm from informal censorship raises grave concerns:

> The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with procedural safeguards of the criminal process. The Commission's practice is in striking contrast,

> in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law. Bantam Books, 372 U.S. at 69-70.

The final Freedman violation is the defendant's lack of assurance of a prompt final judicial determination. The defendant relies upon the existence of the in rem action filed in the state circuit court on March 27, 1990. There is no evidence that any decision has been reached in that case or that a trial date has even been set as of the date of this order. Further, the defendant's decision to initiate judicial proceedings and the timing thereof are completely discretionary with no reasonable guarantee that a prompt decision will be made.

The defendant relies upon the filing date of the state suit to satisfy the dictates of Freedman v. Maryland. Because this action was commenced eighteen days after the Nasty

seizures, reasons Navarro, this civil suit provided the necessary procedural safeguards. Because this position is not legally valid, this court need not reach the issue of whether this eighteen day period would comply with procedural due process.

The Freedman decision requires that there be a prompt and final judicial decision. This includes not only the time from seizure to filing, but also considers the delay between commencement of the lawsuit and a full adversary hearing; and the time after the trial until the court enters a final order on the issue of obscenity. Unreasonable delay or the lack of assurance at any step is fatal to the constitutional adequacy of the state regulation. See e.g., Teitel Films Corp. v. Cusack, 390 U.S. 139(1968)(procedure deficient where no time limit in which judge must issue final order after trial). In this case, there were no assurances at any stage in the proceedings.

Moreover, due process requires more than an assurance of a prompt judicial decision. When the government intends to seize large quantities of presumptively protected materials, the First and Fourteenth Amendments require an adversary hearing

before any seizures are made. See Fort Wayne Books, 109 S.Ct. at 929; Quantity of Books, 378 U.S. at 210-11; Marcus, 367 U.S. at 735-36; Evans, 642 F.Supp. 552(M.D.Ala. 1986), aff'd, 827 F.2d 1483(11th Cir. 1987). The Supreme Court has clearly held that in the case of massive seizures such as here, mere ex parte determinations of probable cause are simply impermissible under the U.S. Constitution. See Fort Wayne Books, 109 S.Ct. at 929; Blount, 400 U.S. at 420.

Therefore, this court finds the defendant's prior restraint in this case violated the plaintiffs' rights under the First and Fourteenth Amendments. Permanent injunctive relief is necessary to prevent future infringements. This court is well aware of the serious implications of interfering with integral state functions such as law enforcement. However, when the Constitutional liberties which we all hold sacred are threatened, this court has both the power and the duty to intervene. See Ex Parte Young, 209 U.S. 123(1908); Edelman v. Jordan, 415 U.S. 651(1974); Steffel v. Thompson, 415 U.S. 452(1974); Wooley v. Maynard, 430 U.S. 705(1977).

And so our legal odyssey ends.

What began as a dispute between two ancient enemies concludes with the hope that they are reconciled by a mutual friend--The Constitution of the United States.

Having considered the above matters and the record in this cause, it is hereby

ORDERED AND ADJUDGED as follows:

(1) The recording As Nasty As They Wanna Be created by the group 2 Live Crew is hereby **DECLARED** obscene.

(2) The action of the Broward County Sheriff's office in threatening retail music stores with arrest for selling the Nasty recording and presenting them with a copy of probable cause order is hereby **DECLARED** unconstitutional as an improper prior restraint of free speech in violation of the First and Fourteenth Amendments to the United States Constitution.

(3) The defendant, Sheriff Nicholas Navarro, and his deputies, agents, servants, employees, attorneys, and persons in active concert or participation with any of them who receive actual notice of this order are all hereby **PERMANENTLY**

ENJOINED from threatening employees, managers, or owners of retail stores selling musical recordings with arrest for selling allegedly obscene materials. The same persons are also hereby **PERMANENTLY ENJOINED** from presenting or speaking about any probable cause order of obscenity to employees, managers, or owners of retail stores selling musical recordings. Nothing in this order shall be understood as prohibiting Sheriff Navarro or any of his deputies, agents, or employees from: (a) giving legal advice to any person who is suspected of violating a valid law prohibiting obscenity where such consultation is genuinely undertaken with the purpose of aiding the suspect to comply with the law and avoid prosecution under the obscenity laws, or (b) vigorously enforcing the obscenity laws of the state of Florida as mandated and required by section 847.011(9), Florida Statutes.

(4) The sole affirmative defense in the answer and the class action claims in the amended complaint are hereby **DISMISSED**. The plaintiffs amended their pleading to include class action allegations, but they never made a motion for

certification of the class. Furthermore, the request to certify a class would be moot as this order awards the same relief which the class could conceivably seek. Judgment is not entered against the defendant on the affirmative defense because the class portion of the case is moot. However, the court does find that the plaintiffs have standing and are "interested part[ies]" within the meaning of the Declaratory Judgment Act, 28 U.S.C. §2201(a).

(5) Any party seeking costs or an award under section 1988, Title 42 of the U.S. Code, shall apply to the court within the time allowed by the Federal Rules of Civil Procedure, the local rules of this court, and other applicable law. The parties' applications, if any, shall include all appropriate factual and legal argument to support the request for an award.

(6) Judgment shall be **ENTERED** on the two counts of the amended complaint by separate order.

(7) The court shall **RETAIN JURISDICTION** to enforce the permanent injunction entered in this case.

DONE AND ORDERED this 6th day of June,

1990

JOSE A. GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE

CC: John Jolly, Jr.

Bruce Rogow

Allen Jacobi

APPENDIX B

LUKE RECORDS, INC., a Florida corporation formerly known as Skyywalker Records, Inc., et al., Plaintiffs-Appellants,

v.

Nick NAVARRO, Sheriff, Broward County, Florida, Defendant-Appellee.

No. 90-5508.

United States Court of Appeals,
Eleventh Circuit.

May 7, 1992.

Record company and musical group which produced recording "As Nasty As They Wanna Be" sought declaratory and injunctive relief after sheriff in Florida County sought ex parte order declaring record obscene, presented copy of order to store owners, and threatened arrest, with result that store owners withdrew recording from their shelves. The United States District Court for the Southern District of Florida, No. 90-6220-Civ-JAG, Jose A. Gonzalez, Jr., 739 F.Supp. 578, enjoined sheriff from further interfering with sale of recording but declared that recording was obscene. Record company and

group appealed. The Court of Appeals held that sheriff failed to carry his burden of proving, even by a preponderance of the evidence, that material was obscene by standards of *Miller v. California* decision of the United States Supreme Court.

Reversed.

Sheriff in Florida county failed to carry his burden of proving, even by a preponderance of the evidence, that musical recording "As Nasty As They Wanna Be" was obscene by standards of *Miller v. California,* where he put in no evidence but tape recording itself and judge trying case relied on his own expertise as to prurient interest community standard and artistic value prongs of test; assuming the judge's familiarity with contemporary community standards was sufficient to carry case as to first two prongs of that test (prurient interest applying community standards and patent offensiveness as defined by Florida law), judge could not, simply by listening to musical work, determine that it had no serious artistic value.

Appeal from the United States District Court for the Southern

District of Florida

Before ANDERSON, Circuit Judge, RONEY and LIVELY*, Senior Circuit Judges.

PER CURIAM:

In this appeal, appellants Luke Records, Inc., Luther Campbell, Mark Ross, David Hobbs, and Charles Wongwon seek reversal of the district court's declaratory judgment that the musical recording "As Nasty As They Wanna Be" is obscene under Fla. Stat. § 847.011 and the United States Constitution, contending that the district court misapplied the test for determining obscenity. We reverse.

Appellants Luther Campbell, David Hobbs, Mark Ross, and Charles Wongwon comprise the musical group "2 Live Crew," which recorded "As Nasty As They Wanna Be." In

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*Honorable Pierce Lively, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

response to actions taken by the Broward County, Florida Sheriff's Office to discourage record stores from selling "As Nasty As They Wanna Be," appellants filed this action in federal district court to enjoin the Sheriff from interfering further with the sale of the recording. The district court granted the injunction, finding that the actions of the Sheriff's office were an unconstitutional prior restraint on free speech. The Sheriff does not appeal this determination.

In addition to injunctive relief, however, appellants sought a declaratory judgment pursuant to 28 U.S.C.A. § 2201 that the recording was not obscene. The district court found that "As Nasty As They Wanna Be" is obscene under *Miller v. California.*[1]

This case is apparently the first time that a court of appeals has been asked to apply the *Miller* test to a musical composition, which contains both instrumental music and

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[1]413 U.S. 15, 93 S.Ct 2607, 37 L.Ed.2d 419 (1973).

lyrics.[2] Although we tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene, that issue is not presented in this case. The Sheriff's contention that the work is not protected by the First Amendment is based on the lyrics, not the music. The Sheriff's brief denies any intention to put rap music to the test, but states "it is abundantly obvious that it is only the 'lyrical' content which makes "As Nasty As They Wanna Be" obscene." Assuming that music is not simply a sham attempt to protect obscene material, the *Miller* test should be applied to the lyrics and the music of "As Nasty As They Wanna Be" as a whole: the basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a

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[2]In a pre-Miller case, United States v. Davis, 353 F.2d 614 (2d Cir.1965), cert. denied, 384 U.S. 953, 86 S.Ct. 1567, 16 L.Ed.2d 549 (1966), that court affirmed the conviction of a defendant for mailing obscene materials, determining that two phonograph records and labels were obscene. Justice Stewart, dissenting from the denial of certiorari, stated that one of the records "consist[ed] almost entirely of the sounds of percussion instruments" and the other was a "transcription of passages from ... a book of poems." 384 U.S. at 953, 86 S.Ct. at 1567.

whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24, 93 S.Ct. at 2615. This test is conjunctive. *Penthouse Intern., Ltd. v. McAuliffe,* 610 F.2d 1353, 1363 (5th Cir.1980). A work cannot be held obscene unless each element of the test has been evaluated independently and all three have been met. *Id.*

Appellants contend that because the central issue in this case is whether "As Nasty As They Wanna Be" meets the definition of obscenity contained in a Florida criminal statute, the thrust of this case is criminal and the Sheriff should be required to prove the work's obscenity beyond a reasonable doubt. In the alternative, appellants assert that at minimum, the importance of the First Amendment requires that the burden of proof in the district court should have been by "clear and convincing evidence," rather than by "a preponderance of the evidence." Assuming, arguendo, that the proper standard is the

preponderance of the evidence, we conclude that the Sheriff has failed to carry his burden of proof that the material is obscene by the *Miller* standards under that less stringent standard. Thus, to reverse the declaratory judgment that the work is obscene, we need not decide which of the standards applies.

There are two problems with this case which make it unusually difficult to review. First, the Sheriff put in no evidence but the tape recording itself. The only evidence concerning the three-part *Miller* test was put in evidence by the plaintiffs. Second, the case was tried by a judge without a jury, and he relied on his own expertise as to the prurient interest community standard and artistic value prongs of the *Miller* test.

First, the Sheriff put in no evidence other than the cassette tape. He called no expert witnesses concerning contemporary community standards, prurient interest, or serious artistic value. His evidence was the tape recording itself.

The appellants called psychologist Mary Haber, music critics Gregory Baker, John Leland and Rhodes Scholar Carlton Long. Dr. Haber testified that the tape did not appeal to the

average person's prurient interest.

Gregory Baker is a staff writer for *New Times Newspaper,* a weekly arts and news publication supported by advertising revenue and distributed free of charge throughout South Florida. Baker testified that he authored "hundreds" of articles about popular music over the previous six or seven years. After reviewing the origins of hip hop and rap music, Baker discussed the process through which rap music is created. He then outlined the ways in which 2 Live Crew had innovated past musical conventions within the genre and concluded that the music in "As Nasty As They Wanna Be" possesses serious musical value.

John Leland is a pop music critic for *Newsday* magazine, which has a daily circulation in New York, New York of approximately six hundred thousand copies, one of the top ten daily newspaper circulations in the country. Leland discussed in detail the evolution of hip hop and rap music, including the development of sampling technique by street disc jockeys over the previous fifteen years and the origins of rap in more

established genres of music such as jazz, blues, and reggae. He emphasized that a Grammy Award for rap music was recently introduced, indicating that the recording industry recognizes rap as valid artistic achievement, and ultimately gave his expert opinion that 2 Live Crew's music in "As Nasty As They Wanna Be" does possess serious artistic value.

Of appellants' expert witnesses, Carlton Long testified most about the lyrics. Long is a Rhodes scholar with a Ph.D. in Political Science and was to begin an assistant professorship in that field at Columbia University in New York City shortly after the trial. Long testified that "As Nasty As They Wanna Be" contains three oral traditions, or musical conventions, known as call and response, doing the dozens, and boasting. Long testified that these oral traditions derive their roots from certain segments of Afro-American culture. Long described each of these conventions and cited examples of each one from "As Nasty As They Wanna Be." He concluded that the album reflects many aspects of the cultural heritage of poor, inner city blacks as well as the cultural experiences of 2 Live Crew. Long

suggested that certain excerpts from "As Nasty As They Wanna Be" contained statements of political significance or exemplified numerous literary conventions, such as alliteration, allusion, metaphor, rhyme, and personification.

The Sheriff introduced no evidence to the contrary, except the tape.

Second, the case was tried by a judge without a jury, and he relied on his own expertise as to the community standard and artistic prongs of the *Miller* test.

The district court found that the relevant community was Broward, Dade, and Palm Beach Counties. He further stated:

> This court finds that the relevant community standard reflects a *more* tolerant view of obscene speech than would other communities within the state. This finding of fact is based upon this court's personal knowledge of the community. The undersigned judge has resided in Broward County since 1958. As a practicing attorney, state prosecutor, state circuit judge, and currently, a federal district judge, the undersigned

has traveled and worked in Dade, Broward and Palm Beach. As a member of the community, he has personal knowledge of this area's demographics, culture, economics, and politics. He has attended public functions and events in all three counties and is aware of the community's concerns as reported in the media and by word of mouth.

In almost fourteen years as a state circuit judge, the undersigned gained personal knowledge of the nature of obscenity in the community while viewing dozens, if not hundreds of allegedly obscene films and other publications seized by law enforcement.

. . . . . .

The plaintiffs' claim that this court cannot decide this case without expert testimony and the introduction of specific evidence on community standards is also without merit. The law does not require expert testimony in an obscenity case. The defendant introduced the *Nasty* recording into evidence. As noted by the Supreme Court in *Paris Adult Theatre I [v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973)], when the

material in question is not directed to a 'bizarre, deviant group' not within the experience of the average person, the best evidence is the material, which 'can and does speak for itself.' *Paris Adult Theatre I,* 413 U.S. at 56 & n. 6, 93 S.Ct. at 2634 & n. 6.

In deciding this case, the court's decision is not based upon the undersigned judge's personal opinion as to the obscenity of the work, but is an application of the law to the facts based upon the trier of fact's personal knowledge of community standards. In other words, even if the undersigned judge would not find *As Nasty As They Wanna Be* obscene, he would be compelled to do so if the community's standards so required.[3]

It is difficult for an appellate court to review value judgments.[4] Although, generally, these determinations are

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[3]*Skywalker Records, Inc. v. Navarro,* 739 F.Supp. 578, 589, 590 (S.D.Fla.1990).

[4]*See Marks v. United States,* 430 U.S. 188, 198, 97 S.Ct. 990, 996, 51 L.Ed.2d 260 (1977) (Stevens, J., concurring in part and dissenting in part); *United States v. 2,200 Paper Back Books,* 565 F.2d 566, 570 & n. 7, 571 (9th Cir.1977); *United States v.*

made in the first instance by a jury,[5] in this case the district judge served as the fact finder, which is permissible in civil cases.[6] Because a judge served as a fact finder, however, and relied only on his own expertise, the difficulty of appellate review is enhanced.[7] A fact finder, whether a judge or jury, is

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Obscene Magazines, Film & Cards, 541 F.2d 810, 811 (9th Cir.1976).

[5]*Cf. Miller,* 413 U.S. at 26-7, 93 S.Ct. at 2616.

[6]*Penthouse,* 610 F.2d at 1363 (citing *e.g., Alexander v. Virginia,* 413 U.S. 836, 93 S.Ct. 1803, 37 L.Ed.2d 993 (1973).

[7]In *Penthouse Intern. Ltd. v. McAuliffe,* 610 F.2d 1353 (5th Cir.1980), the Court stated:

> We realize that Judge Freeman, as a member of the community of Fulton County, Georgia, is probably able to determine whether the average person, applying contemporary community standards would find that a work taken as a whole appeals to the prurient interest. But in this case, we must exercise our power of independent review and declare that taken as a whole, 'Penthouse' and 'Oui' appeal to the prurient interest....
> ....
> While we realize that Judge Freeman, as a member of the community, should possess insight as to what the average person of Fulton County, Georgia, applying contemporary community standards would find patently offensive, we must exercise our power of independent review. This is especially important because Judge Freeman may have not examined the question of 'describing sexual conduct.' We therefore conclude

limited in discretion.[8] "Our standard of review must be faithful to both Rule 52(a) and the rule of independent review."[9] "The rule of independent review assigns to appellate judges a constitutional responsibility that cannot be delegated to the trier of fact," even where that fact finder is a judge.[10]

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that the district court incorrectly determined that 'Penthouse' and 'Oui' do not include patently offensive depictions or descriptions of sexual conduct.

610 F.2d at 1364, 1366. *See also United States v. Various Articles of Obscene Merchandise,* 709 F.2d 132, 138 (2d Cir.1983) (Meskill, J. concurring in the result) ("On a prior appeal to this Court, a different panel of which I was a member, reversed [District] Judge Sweet's finding of non-obscenity because he had relied upon impermissible indicia of community standards.... Today, we affirm. In so doing, the majority accords uncommon deference to Judge Sweet's finding.... I am ill equipped to question Judge Sweet's assessment. Moreover, the government failed to introduce any evidence pertaining to community standards to facilitate our review. Had this case originated in the District of Connecticut, a community whose standards are familiar to me, I would not hesitate to reverse; but it did not. I reluctantly concur.").

[8]*Penthouse,* 610 F.2d at 1363. *See Miller,* 413 U.S. at 25, 93 S.Ct. at 2615.

[9]*Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 1959, 80 L.Ed.2d 502, 515 (1983).

[10]*Id.* 466 U.S. at 501, 104 S.Ct. at 1959.

In this case, it can be conceded without deciding that the judge's familiarity with contemporary community standards is sufficient to carry the case as to the first two prongs of the *Miller* test: prurient interest applying community standards and patent offensiveness as defined by Florida law. The record is insufficient, however, for this Court to assume the fact finder's artistic or literary knowledge or skills to satisfy the last prong of the *Miller* analysis, which requires determination of whether a work "lacks serious artistic, scientific, literary or political value."[11]

In *Pope v. Illinois,*[12] the Court clarified that whether a work possesses serious value was not a question to be decided by contemporary community standards.[13] The Court reasoned that the fundamental principles of the First Amendment prevent the value of a work from being judged solely by the amount of acceptance it has won within a given community:

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[11]*Miller,* 413 U.S. at 24, 93 S.Ct. at 2615.

[12]481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987).

[13]*Id.* 481 U.S. at 500-01, 107 S.Ct. at 1920-21.

> Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won.[14]

The Sheriff concedes that he has the burden of proof to show that the recording is obscene. Yet, he submitted no evidence to contradict the testimony that the work had artistic value. A work cannot be held obscene unless each element of the *Miller* test has been met. We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value.

REVERSED.

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[14]*Id.* 481 U.S. at 500-01, 107 S.Ct. at 1921.

APPENDIX C

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

CASE NO: 90-5508

LUKE RECORDS, INC., A FLORIDA CORPORATION FORMERLY KNOWN AS SKYYWALKER RECORDS, INC., ET AL.,

Plaintiffs-Appellants,

v.

NICK NAVARRO, SHERIFF, BROWARD COUNTY, FLORIDA

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING

Before: ANDERSON, Circuit Judge, RONEY AND LIVELY*, Senior Circuit Judges.

PER CURIAM:

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*Honorable Pierce Lively, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

CASE NUMBER: 90-5508

LUKE RECORDS, INC.; LUTHER CAMPBELL; MARK ROSS; DAVID HOBBS; CHRIS WONGWON,

Plaintiffs/Appellants,

vs.

NICK NAVARRO, Sheriff of Broward County, Florida,

Defendant/Appellee.

On Appeal From A Decision Of The United States District Court For The Southern District of Florida

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PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to 11th Cir. R. 28-2(b), Appellee certifies that the following is a complete list of persons in addition to the parties who have an interest in the outcome of this case:

American Civil Liberties Union

Atlantic Telecommunications Corporation

Kevin Baine, Esquire

Honorable Jose A. Gonzalez, Jr.

Home Box Office, Inc.

Allen Jacobi, Esquire

John W. Jolly, Jr., Esquire

Richard A. Purdy, Esquire

Recording Industry Association of America

Steven Reich, Esquire

Bruce Rogow, Esquire

Jack Thompson, Esquire

Time-Warner Communications, Inc.

Daniel M. Waggoner, Esquire

RICHARD A. PURDY

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgement, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and the former 5th Circuit Court of Appeals and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

1. U.S. v Groner, 479 F.2d 577 (5th cir.)(en banc), vacated 414 U.S. 969,94 S.Ct. 278, 38 l.Ed.2d 213 (1973) (remanded for consideration in light of Miller v California, 413 U.S. at 15, 93 S.Ct. at 2607), adhered to, 494 F.2d 499 (5th Cir.), cert. denied, 419 U.S. 1010,95 S.Ct. 331, 42 L.Ed 2d 285 (1974)

2. Paris Adult Theatre v Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973)

3. Kaplan v California, 413 U.S. 15, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973)

4. U.S. v Bagnell, 679 F.2d 826 (11th Cir., 1982)

I express a belief, based on a reasoned and studied

professional judgement, that this appeal involves one or more questions of exceptional importance:

1. May a district court judge in his discretion allow experts to testify regarding their opinion of serious literary, artistic, political or scientific value of alleged obscene material and then as the trier of fact reject the experts testimony and find the material is obscene based upon the content of the material itself?

2. Is the government or law enforcement required to call expert witnesses when the district court in its discretion allows the party claiming the material is not obscene to present expert testimony?

3. Is the standard of review by the appellate court any different when reviewing sufficiency of the evidence to support findings of fact by a judge or a jury?

4. Can alleged music on an audio tape be so nasty as to exceed the constitutional protection of the First Amendment to the United States Constitution?

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By_____
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Fla. Bar #124506

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STATEMENT OF THE ISSUE ASSERTED TO MERIT EN BANC CONSIDERATION

I. - Whether expert testimony is required to rebut expert testimony in obscenity cases when the alleged obscene material is introduced into evidence i.e. whether the district court is bound by expert testimony or may reject it if it is not countered by conflicting expert testimony.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The Appellant, Luke Records, Inc., sought a declaratory judgement in the district court as to the audio cassette recording As Nasty As They Wanna Be. The district court found and declared the recording obscene. Skyywalker Records, Inc. v. Navarro, 739 F.Supp. 578 (S.Dist., Fla., 1990). The court of appeals for the 11th Circuit reversed the district court in Luke Records, Inc. v. Navarro, 11th Circuit Court of Appeals Case No. 90-5508, May 7, 1992. The Appellee herein files this Motion for Rehearing and Suggestion for En Banc Consideration.

STATEMENT OF THE FACTS

On February 26, 1990, Detective Mark Wichner, a Broward County Florida Deputy Sheriff appointed by the Appellee, NICHOLAS G. NAVARRO, Sheriff of Broward County, purchased a cassette tape entitled As Nasty As They Wanna Be by the 2 Live Crew. The lyrics of six (6) of the songs were transcribed by Detective Wichner in an Affidavit for Order of Determination of Probable Cause of Obscenity that was sworn to on March 9, 1990. The lyrics to three of the six songs are as follows:

Bad Ass Bitch
[NOTE: Partial transcription]

> Let's get butt booty naked and do the wild thing.
> First she took off her panties, snatched off her bra.
> I pooped the biggest tits I ever saw-
> They were big enough to knock a man down,
> They were shaped like grapes in my favorite shade of brown
>
> My dick was hard and she was hot like a heater,
> By the looks of her mouth, she was dick eater.
> I said, "You raggedy bitch, don't play dumb!
> Put my dick in your mouth and make this motherfucker cum!"

Ya! Yo! This bitch in on!
Bad Ass Bitch.

The head was smoking, I had to call my friends,
While the next ten minutes all the boys were in.
Dat was in the front and lat was in the back.
The pussy was poppin like cracker jacks.
She asked ..??... put her in the trick,
I gave her a pen for every inch of my dick.
We kept on fucking until the early morn.
That bitch was on.
Bad Ass Bitch.

Dick Almighty
[NOTE: Partial transcription]

What the fuck is your name, motherfucker?
Long rod, thick frank, stiff peter. .

[Random comments]

And my greatest thrill is to bust my nuts in a bitch's mouth.
That dick almighty, that dick almighty.
Dick almighty's of no surprise,
It'll fuck all the bitches, all shapes and size.
She'll climb a mountain, even run the block
Just to kiss the head of this big black cock.
He'll tear the pussy open, 'cause it's satisfaction.
The bitch won't leave, it's fatal attraction.
Dick's so proudful, she'll kneel and pray,
Awaiting her time, hopin soon to slay..
That dick will make a bitch cry.
We're fucking the bitch that's tight inside.
That dick has got a spell on you,

Once it gets inside, you'll act the fool.
That dick will make a bitch act cut-
Suck my dick, bitch, it'll make you puke.
Jump on it, grab it, like ya want it.
If you could wear a dick, bitch. You would flaunt it.
That dick almighty, dick almighty.

C'Mon Babe

Hard, baby. Fuck me. Harder. Oh, god, I can't stop.
Oh, come inside me. Oh, come in me.
C'Mon babe, fuck me [repeated numerous times]

[All of the below is interspersed with female groans]
When the party's over, we can get together,
Go to my house and fuck forever.
And do whatever comes to mind.
Let me stick my dick in your behind.
Pour me a glass of Dom perignon.
Then suck my dick until I come.
[Unintelligible]
C'mon babe, we can do it

No need to expect...
Fuck you in this position...
C'Mon babe, fuck me [repeated numerous times]...

Together as one, we will be,
I'll be fucking you and you'll be sucking me
Lick my ass up and down
Lick me 'til your tongue turns do-do brown...

Fucking each other like lovers do,

When the pussy's wet I know what to do...
Suck it, bitch, because you can do this.

C'mon babe, fuck me [repeated numerous times]...

You say you don't fuck on the first date,
Then fuck you, bitch, I ain't gonna wait.
My dick is hard, and my back is strong.
I'll find another bitch to get it on...

C'mon babe, fuck me...[on and on]

You wanna play cat and mouse,
When I catch you I'm gonna stick my dick in your mouth.
Now stop the teasing and start the pleasing.
Just fuck me good until I sleep...

Suck this dick, put me at ease...
Something heavy, please don't bite...

C'mon babe, fuck me [repeated numerous times]..."

(NOTE: The lyrics to "Me So Horny", "Dirty Nursery Rhymes", and "C'Mon Babe" are similar and only omitted to keep this motion to 15 pages.)

On March 2, 1990, Honorable Mel Grossman, Circuit Judge, 17th Judicial Circuit, Florida reviewed the aforesaid Affidavit of Wichner and listened to the entire tape of As Nasty As They Wanna Be (NASTY). On March 9, 1990, Judge Grossman entered an Order of Determination of Probable

Cause of Obscenity regarding the NASTY tape. In the Order Judge Grossman noted that his "application of contemporary community standards is shared by as avid a First Amendment proponent as the Miami Herald" and cited a Miami Herald article of February 28, 1990 that said "many of 2 Live Crew's lyrics are so filled with hard-core sexual, sadistic and masochistic material that they could not be printed here, even in censored form".

Testimony was taken before the district court judge that heard the instant action on a Motion for Preliminary Injunction and the parties stipulated that the trial court could consider this testimony "for any purposes" at the trial of the instant action. The testimony of the preliminary injunction hearing was not transcribed and not made a part of the Record on Appeal by either party to this action.

At the trial of this action on May 14 and 15, 1990, detective Mark Wichner testified that he thought the nasty tape as a whole might be obscene so he presented it to a judge. He also said the tape was "extremely explicit", "degrading" to the

female sex and at some points extremely violent but that on the whole it described sexual activity. He said the songs were "sexually abusive".

At the trial, the tape As Nasty As They Wanna Be was played in its entirety. Neither party had the entire tape transcribed and the lyrics are not part of the Record on Appeal (except the lyrics contained in the probable cause affidavit of detective Wichner). The tape itself was admitted into evidence.

At the trial, the Sheriff called no expert witness and the Appellee called several experts who testified that in their opinion As Nasty As They Wanna Be had serious literary, artistic, political or scientific value. The Sheriff cross-examined the experts. Members of the 2 Live Crew band also testified regarding the tape, its music and its lyrics. The Sheriff cross-examined the band members.

The district court, sitting as the trier of fact found the tape As Nasty As They Wanna Be was obscene, and issued an opinion with his view of the facts and the law. Skyywalker Records, Inc. v Navarro, 739 F.Supp. 578 (S.Dist., Fla., 1990).

ARGUMENT AND AUTHORITIES IN SUPPORT OF MOTION FOR REHEARING AND EN BANC CONSIDERATION

Two Live Crew painted black and white stripes on a cow and sold it. The Sheriff thought it was a cow and took it to a state circuit court judge. The judge looked at it and found probable cause as a matter of law that it was a cow. Two Live Crew took it to the District Court for the Southern District of Florida, Judge Gonzalez, and asked him to decide what it was in an adversary declaratory judgement proceeding. Two Live Crew presented experts in the field of striping who said this cow is a zebra. The Sheriff thought those experts may have special knowledge in the field of striping but striping does not make a cow into a zebra. Any person can see it is a cow and I do not need an expert to tell that to the judge. The District Court looked at the whole cow and found that despite the stripes and the expert opinions the animal was indeed a cow. The 11th Circuit Court of Appeals panel decision holds that the district judge must accept the experts opinion. Today the law in this circuit is that a cow with painted black and white stripes is a zebra.

The panel decision of May 7, 1992 is a remarkable departure from the traditional concepts of evidence, weight of evidence, district court discretion in the admission of evidence and fact finding by judge or jury. It is an unprecedented ruling that in obscenity cases, the government must have expert testimony to rebut expert testimony. There are no other cases that give such conclusive effect to the weight and credibility of expert testimony.

The panel decision is inconsistent with a long line of federal and state cases and directly conflicts with U.S. v Groner, 479 F.2d 577 (5th cir.)(en banc), vacated 414 U.S. 969,94 S.Ct. 278, 38 l.Ed.2d 213 (1973) (remanded for consideration in light of Miller v California, 413 U.S. at 15, 93 S.Ct. at 2607), adhered to, 494 F.2d 499 (5th Cir.), cert. denied, 419 U.S. 1010,95 S.Ct. 331, 42 L.Ed 2d 285 (1974). The panel decision is also inconsistent with the holding of Paris Adult Theatre v Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) and Kaplan v California, 413 U.S. 15, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973), and in conflict with U.S. v Bagnell, 679 F.2d 826 (11th Cir.,

1982).

The original panel decision in U.S. v Groner, 475 F.2d 550 (5th Cir., 1972) (GRONER I), in many respects parallels the panel opinion in the case at bar. There Judge Thornberry wrote an opinion joined by Judge Morgan and concurred in by Judge Clark. Groner was convicted by a jury of using a common carrier in interstate commerce to transport a quantity of obscene books. At trial, the government put on no experts to show that the books were themed to appeal to the prurient interest of its readers, went substantially beyond the community limits of candor in their description of sex and nudity, or were devoid of all redeeming social value. GRONER I, at pages 551-552. Groner presented experts in the fields literature and psychology to the effect that the books did not violate any of the three elements of prurient interest, substantially beyond community limits of candor in descriptions of sex and devoid of all redeeming social value. GRONER I, at page 552. The panel found the books to be "...vile, filthy, disgusting, vulgar and on the whole, quite uninteresting" yet the panel in GRONER I held

that they were incapable of applying the obscenity test without guidance from experts or otherwise. GRONER I at page 552,554. They remanded for a new trial and held that expert testimony is required on the elements of obscenity. GRONER I at page 559. A petition for rehearing and rehearing en banc was granted.

The en banc opinion in U.S. v Groner, 479 F.2d 577 (1973) (GRONER II) was an 8-7 decision with current 11th Circuit judges Dyer, Clark and Roney in the majority and judge Morgan joining the dissent. GRONER II squarely held that "...pictures, books, publications or other materials involved may serve as evidence to contradict the opinion of the expert. It has long been the rule that triers of fact, judges and juries alike, are not required to accept expert opinions". GRONER II at page 584. (citations omitted). The court said "There is profound wisdom in the rule which permits judges and juries after proper consideration to disregard the opinions of experts." GRONER II at page 585. Qualified experts disagree in many fields of knowledge; judges who are qualified experts in law disagree. id.

at p.585. GRONER II in reversing the panel decision of GRONER I said that the rule that the prosecution must support its proof by expert testimony on the elements of obscenity is "...misconceived, unnecessarily burdensome, and confounds traditional concepts of proof. It is little more than a fetishism formulated in the name of the First Amendment. We conclude that expert testimony on the elements of obscenity is not a constitutional necessity." GRONER II at page 579. Further, the en banc opinion said the panel in GRONER I seemed to have difficulty in making an independent review without expert testimony. GRONER II at p. 579. So does the panel opinion in the case at bar express such a difficulty. Although 7 judges in GRONER II decided on a singular Kois test of obscenity without the "patently offensive" or "utterly without redeeming social value" elements, the majority using Roth made an "independent constitutional judgement" and said "...we have no difficulty in applying this test without the help of expert testimony on the part of the prosecution." GRONER II at p. 583.

GRONER II said that a judge may permit an expert to give testimony even if he is convinced that the material is vile, filthy, vulgar and disgusting, but the ultimate decision classically rests with the jury upon proper instructions or with the judge as fact finder. GRONER II at p. 585.

Judge Ainsworth in a concurring opinion joined by 7 other judges adopted the Roth test and said "to hold, in effect, that we must turn the application of the obscenity statutes over to a collection of randomly chosen Ph.D.'s as expert witnesses in such matters, is to require abdication of the judicial function of the judge or jury as triers of fact." *** "We can discern for ourselves in reviewing this case, as the jury did initially, that the materials involved are obscene within the definition of Roth. To seek an expert to reinforce our views would be to guild the lily. Such an expert would be no more suitable to draw a conclusion or furnish information in this regard than would judges and juries." GRONER II at p.588.

Judge Clark confessed error in concurring in the original panel decision. "I am now sure that a rule requiring expert

opinion evidence in obscenity cases is not required by precedent, is wrong, and would compound rather than solve any problem in this bewildering area". GRONER II at p.588.

The panel decision in the case at bar is clearly in direct conflict with the GRONER en banc holding. GRONER II has been relied on and cited in a multitude of state and federal court decisions including the U.S. Supreme Court.

Paris Adult Theatre v Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) cites GRONER II in holding that it was not error to fail to require expert testimony when the materials themselves were placed into evidence and in footnote 6 GRONER II is cited for the statement that "no such assistance is needed by jurors in obscenity cases; indeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." Paris, 93 S.Ct. at page 2634. Paris held the films are the "best evidence of what they represent". Paris, 93 S.Ct. at p.2634.

While Paris involved the exclusion of experts rather than

the failure to rebut expert testimony and was so distinguished by the panel decision in the case at bar, Kaplan v California, 413 U.S. 15, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973) on its facts and holding is in direct conflict with the panel's ruling that expert opinions must be countered with conflicting expert opinions. Kaplan involved obscene books with no photos much like the case at bar which involves lyrics with no photos but sound enhancement of the obscene lyrics. At trial in the Kaplan case, the state did have experts but only on the issues of purient interest and beyond limits of candor in California but the state did not present any expert on the issue of "utterly without redeeming social value." Kaplan, 93 S.Ct. at p.2683. The only state "expert" was a police officer on the vice squad. The defendant presented expert testimony that the books did have social value. People v Kaplan, 23 Cal. Rep.3d Supp. 9,"; 100 Cal.Rptr. 372, 373 (1972). Thus Kaplan involves the same issue of unrebutted expert opinion on the social value element of obscenity as does the case at bar.

Kaplan held that expression by words alone or oral

utterances can be legally "obscene" and that "the defense should be free to introduce appropriate expert testimony, see Smith v California, 361 U.S. 147, 164-165 (1959) (Frankfurter, J., concurring), but in the cases in which this court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question. Ginsburg v U.S., 383 U.S. 463, 465 (1966). See U.S. v Groner, 479 F.2d 577, 579-586 (CA 5 1973). On the record in this case, the prosecution's evidence was sufficient as a matter of federal constitutional law to support petitioner's convictions". People v Kaplan, 93 S.Ct. at page 2685.

The panel decision in the case at bar holds that as a matter of law the Sheriff's evidence - the tape itself - on the third element of Miller - serious literary, artistic, political or scientific value - is not sufficient. Since the books were sufficient in themselves to rebut experts for the U.S. Supreme Court in Kaplan using the lesser standard of "without redeeming social value" the tape itself is sufficient by itself to rebut the 2 Live

Crew's experts on serious value. The panel decision in the case at bar therefore directly conflicts with the U.S. Supreme Court decision in Kaplan, and further directly conflicts with the Supreme Court's interpretation and application of U.S. v Groner, 479 F.2d 577 (5th Cir., 1973) (GRONER II).

The former 5th Circuit Court of Appeals cited Paris Adult Theatre, supra, as confirming the GRONER II holding on expert witnesses:

> "We held in United States v Groner, 1973, 479 F.2d 577 (En banc), that expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact. That we were correct in this opinion was made clear in Paris Adult Theatre I v. Slaton, supra, 413 U.S. at 56, 93 S.Ct. at 2634, 37 L.Ed.2d at 456. See also Kaplan v. California, supra, 413 U.S. at 120, 93 S.Ct. at 2684, 37 L.Ed..2d at 498." U.S. v. Thevis, 484 F.2d 1149 (5th Cir., 1973).

Again in U.S. v Thevis, 490 F.2d 76 (5th Cir., 1974), the Fifth Circuit noted that Paris cited GRONER II with approval.

The 1974 Thevis opinion was held pending determination of Miller, Paris, Kaplan and other Supreme Court obscenity cases.

In U.S. v. Ratner, 502 F.2d 1300 (5th Cir., 1974), the former 5th Circuit withheld decision on the appeal pending the final disposition of GRONER II through the appellate process. After GRONER II was adhered to, U.S. v Groner, 494 F.2d 499 (5th Cir., 1974) (GRONER III), the court cited it and Hamling v U.S., 418 U.S. 87, 94 S.Ct. 2387, 41 L.Ed.2d 590 (1974) and held:

> "Together, Groner and Hamling squarely reject the following arguments of the appellants: (1) that the prosecution must introduce expert testimony to enable the jury to determine the obscenity of the material in question..." U.S. v Ratner, supra, at page 1301.

Ratner also held that the Miller standard was "less stringent" with regard to the serious value element. Ratner, supra, at page 1302.

GRONER II and GRONER III were cited by the 11th Circuit Court of Appeals in 1982 in U.S. v. Bagnell, 679 F.2d

826 (11th cir., 1982). In an opinion written by Judge Vance and joined by Judges Anderson and Hatchett, this court held:

> "while expert testimony in obscenity cases is not required, it clearly is permissible... The district court in obscenity cases has 'wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony'..." (citations omitted). Bagnell, supra, at p.833.

The court in Bagnell approved the district court's allowing an expert to testify for the prosecution but held that the court might very well have excluded the expert relying on GRONER II and GRONER III.

Bagnell illustrates the evidence dilemma the panel decision in the case at bar presents to the district courts. If courts have wide discretion to admit so-called obscenity experts, then why should they not be free to reject their testimony as of little weight or nonsense and more to the point why should they not be free to weigh the reasonableness of their testimony against the alleged obscene material itself? The panel decision

in the case at bar directly conflicts with Bagnell to the extent that it substantially changes the law with regard to the discretion to admit evidence and especially experts in obscenity cases. The panel decision holds that if they are permitted to testify and if the government or law enforcement agency fails to respond, the experts opinions are binding and cannot be rejected by the trier of fact. This is not good law and the full court should therefore review the issue in the case at bar.

CONCLUSION

The panel decision in the case at bar should be reviewed by the full court to determine if the 11th Circuit will abdicate the en banc decision of U.S. v Groner, 479 F.2d 577 (5th Cir., 1973) and the decision on remand, U.S. v Groner, 494 F.2d 499 (5th Cir., 1974) as well as the 11th Circuit decision in U.S. v Bagnell, 679 F.2d 826 (11th Cir., 1982). The panel decision should be reviewed by the full court because it is inconsistent with the holding of Paris Adult Theatres v Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) and it directly conflicts

with the holding of Kaplan v California, 413 U.S. 15,93 S.Ct. 2680, 37 L.Ed.2d 492 (1973).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY mailing a true copy of the foregoing to: BRUCE ROGOW, Esquire, 2441 S.W. 28th Avenue, Fort Lauderdale, Florida 33312; ALLEN L. JACOBI, Esquire, Jacobi & Jacobi, 1313 N.E. 125th Street, North Miami, Florida 33161; KEVIN BAINE, Esquire, Williams & Connolly, Hill Building, 839 - 17th Street, N.W., Washington, D.C. 20006; STEVEN REICH, Esquire, Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044; JOHN T. MITCHELL, Esquire, Arent, Fox, Kintner, Plotkin & Kahn, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036-5339; and DANIEL M. WAGGONER, Esquire, Davis, Wright & Tremaine, 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688, this 27th day of May, 1992.

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-672

In The

Supreme Court of the United States

October Term, 1992

NICHOLAS G. NAVARRO,
Sheriff of Broward County, Florida,

Petitioner,

vs.

LUKE RECORDS, INC., LUTHER CAMPBELL,
MARK ROSS, DAVID HOBBS, CHRIS WONGWON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONSE IN OPPOSITION

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QUESTION PRESENTED

GIVEN THE *POPE V. ILLINOIS*, 481 U.S. 497 (1987), HOLDING THAT A WORK CANNOT BE OBSCENE IF A REASONABLE PERSON WOULD FIND THAT IT HAS SERIOUS ARTISTIC VALUE, MAY A TRIAL JUDGE DISREGARD UNREBUTTED ARTISTIC VALUE EXPERT TESTIMONY AND SUBSTITUTE HIS OWN VIEW BASED SOLELY UPON THE ARTWORK ITSELF, ABSENT A FINDING THAT THE EXPERT WITNESSES WERE NOT REASONABLE PEOPLE?

PARTIES

Petitioner

Nicholas G. Navarro, as Sheriff of Broward County, Florida[1]

Respondents

Luke Records, Inc. (formerly Skyywalker Records, Inc.)

Luther Campbell

David Hobbs

Mark Ross

Chris Wongwon (mistakenly designated Charles Wongwon in the court below)

---

[1] Petitioner Nicholas G. Navarro was defeated in the 1992 Republican primary election for County Sheriff. Because this suit was brought against Navarro in his official capacity, if a decision on the Petition is not reached before Navarro leaves office in January, his successor Ron Cochran will succeed him as the named party and Petitioner in this Court. *See Hafer v. Melo*, ___ U.S. ___, 112 S.Ct. 358, 361 (1992); Fed.R.Civ.P. 25(d)(1); Fed.R.App.P. 43(c)(1); R.S.Ct. 35.3.

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For The Eleventh Circuit

RESPONSE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). The opinion of the district court (Pet. App. A) is reported at *Skyywalker Records, Inc. v. Navarro*, 739 F.Supp. 578 (S.D. Fla. 1990).

STATUTORY PROVISION

Florida Statute Section 847.001(7)

"Obscene" means the status of material which:

(a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;

(b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

This case began as an action for declaratory and injunctive relief, claiming a deprivation of civil rights pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343, and seeking relief under 28 U.S.C. §§ 2201(a) and 2202(b). Plaintiffs were Skyywalker Records, Inc.,[2] which had produced the rap musical recording "As Nasty as They Wanna Be" by 2 Live Crew, and the individual members of the recording group, Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon. The Defendant, Nick Navarro, was sued in his official capacity as Sheriff of Broward County, Florida.

The Sheriff, through his agents, had obtained an ex-parte judicial determination of probable cause that "As

[2] During the course of this litigation the corporate name was changed to Luke Records, Inc.

Nasty as They Wanna Be" was legally obscene under § 847.001, Florida Statutes.[3] Sheriff's deputies distributed copies of the order to area record stores, advising sellers that continued sales of the recording would subject them to arrest and prosecution. All retail sales of the recording in the county were halted as a result of these "warnings." The Sheriff took no further legal action.

The Plaintiffs initiated their civil rights action seeking a declaration that "As Nasty as They Wanna Be" was not legally obscene, and also seeking an injunction against the Sheriff's actions as an unconstitutional prior restraint. The district court placed the burden of proof on the Defendant Sheriff, whose actions under color of state law attempted to suppress presumptively protected speech.

The district court found that the Sheriff's actions amounted to a county wide seizure of "As Nasty as They Wanna Be," and an unconstitutional prior restraint, vesting "unbridled discretion in nonjudicial officials." (Pet. App. A-72).[4] On the issue of obscenity, however, the Sheriff prevailed in the district court. The district court declared the record to be "obscene."

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[3] The Plaintiffs never prepared, published, or distributed a transcription of the lyrics of "As Nasty as They Wanna Be." Sheriff's deputies prepared and submitted a transcription of some of the songs, along with the recording, to the state circuit court judge who issued the order of probable cause.

[4] The state court judicial order of "probable cause" of obscenity was noted by the district court to have no legal effect. (Pet. App. A-67).

The critical testimony at the non-jury trial in district court consisted of expert testimony from Plaintiffs' experts. Two music critics, Gregory Baker of Miami's *New Times Newspaper*, a weekly arts and news publication, and John Leland, pop music critic for New York *Newsday*, one of the top ten circulation daily newspapers in the country, found serious artistic value in "As Nasty as They Wanna Be."[5] Rhodes Scholar and political scientist Carlton Long testified that the lyrics expressed serious political and literary themes, reflecting the cultural heritage of poor, inner city African Americans. The Sheriff presented no rebuttal testimony, but merely played the recording in open court.

The district court concluded that the Sheriff had met his burden of proving that "As Nasty as They Wanna Be" satisfied the three-pronged test for obscenity of *Miller v. California*, 413 U.S 15 (1973), and § 847.001, Florida Statutes, and was legally obscene. The Eleventh Circuit Court of Appeals reversed.

The Eleventh Circuit conceded, without deciding, that the trial judge as finder of fact could determine the "community standards" prongs of the *Miller* test. But reversal was based on the third prong of *Miller* and *Pope v. Illinois*, 481 U.S. 497 (1987), the "value" prong. The court below held that, based on the appellate record in

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[5] The district court decision never mentioned John Leland. His credentials as a pop music critic, specializing in black music, specifically hip-hop and rap, were impeccable. He was formerly music editor of *Spin Magazine*, and published articles on music in the *New York Times, London Times, Vogue*, and other periodicals.

this case, the trial judge could not rely on his own knowledge to decide the "value" prong contrary to the Plaintiffs' expert testimony:

> In *Pope v. Illinois*, the Court clarified that whether a work possesses serious value was not a question to be decided by contemporary community standards.

(Pet. App. B-15)

* * *

> We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value.

(Pet. App. B-16)

The Sheriff's petition for rehearing in the Eleventh Circuit Court of Appeals was denied, and he filed a timely Petition for Writ of Certiorari in this Court.

ARGUMENT

I.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION BELOW WAS IN ACCORD WITH THE DECISIONS OF THIS COURT

Petitioner attempts to find conflict with prior decisions of this Court by overstating the holding and significance of the decision below. The Petition for Writ of Certiorari states:

> The Eleventh Circuit has decided that as a matter of federal constitutional law, expert testimony *must be offered* by the party with the

> burden to prove obscenity, in order to meet the requirement of the third prong of *Miller*, supra, where the allegedly obscene material involves the lyrics of a musical composition.

(Petition at 14-15) (emphasis supplied). Nowhere in its opinion does the Eleventh Circuit compel expert testimony to prove musical lyrics are obscene. The essence of the decision below is that when a party defending his or her work has introduced reasonable expert testimony attesting to artistic value, a trial judge may not substitute his or her artistic perceptions to declare the work obscene. The decision below was limited to the evidence in this case. Its result is consistent with *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

Paris Adult Theater addressed the need for expert testimony in the prosecution's prima facie case for criminal obscenity and held that the state is not required to present expert testimony to prove obscenity. 413 U.S. at 55. It did not address whether rebuttal evidence might be necessary when a criminal defendant, or as in this case a civil proponent of challenged material, presents credible evidence of serious literary, artistic, political or scientific value.

The decision below neither creates the *per se* rule that Petitioner suggests, nor poses conflict with *Paris Adult Theater*. The decision below is limited to the unique facts of this case; unrebutted evidence that credible and reasonable people found the presence of artistic value which saved the record under *Pope v. Illinois*, 481 U.S. 497 (1987). *See infra* at 7. The Sheriff made no effort to rebut that evidence.

This Court held in *Bose Corp. v. Consumers Union of U.S., Inc.* 466 U.S. 485 (1983), that an appellate court's role is substantially greater when First Amendment rights are at stake than in other types of cases. Thus, whether the finder of fact is judge or jury, appellate review requires an independent review of the entire record in order to assure that important constitutional rights are protected. *See Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S.Ct. 2695, 2705 (1990). The Eleventh Circuit conducted such an independent review of the record in this case (Pet. App. B-14).

The district judge made no finding that Plaintiffs' experts were not credible or reasonable, yet he disregarded their testimony in favor of a community standard test. He stated:

> [E]ven if the undersigned judge would not find *As Nasty as They Wanna Be* obscene, he would be compelled to do so if the community's standards so required.

(Pet. App. A-33). That error, presuming that community standards dictated the outcome, ignored the lesson of *Pope v. Illinois*, 481 U.S. 497 (1987).

Pope v. Illinois clarified the three-part *Miller* standard for obscenity, and held that, unlike the "prurient interest" and "patently offensive" prongs, the "value" prong is not a community standard test.

> The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

481 U.S. at 500-501. Value is considered differently, precisely to protect the minority view from majority rule.

> [T]he mere fact that only a minority of a population may believe a work has serious value does not mean the "reasonable person" standard would not be met.

Ibid. at 501, n.9.

Thus, the Eleventh Circuit was correct in its determination that the trial court's disregard of Plaintiffs' experts, with no finding that they were not credible as witnesses, was not constitutionally justifiable when the entire record was considered. *Bose, supra.*

Petitioner also asserts conflict with *Kaplan v. California*, 413 U.S. 115 (1973). *Kaplan* held that a book without illustrations may be legally obscene based on words alone, and affirmed a state misdemeanor conviction which was obtained prior to this Court's decision in *Miller v. California*, 413 U.S. 15 (1973). At the criminal trial, both sides presented expert testimony on the content and nature of the book, although only the defense offered expert testimony on the "utterly without redeeming social importance" prong of the applicable state test for obscenity. *Kaplan*, 413 U.S. at 121. Petitioner suggests that this case and *Kaplan* present parallel questions of the state's burden of proof, and that *Kaplan* decided unequivocally that the state's burden is satisfied if the material in question is introduced into evidence

Kaplan is inapposite, first because it was not decided upon the *Miller* test, which was articulated the same day that *Kaplan* was decided, and second because it predates *Pope v. Illinois* and *Bose Corp. v. Consumer's Union*, which

guided appellate review in this case. A fair reading of *Kaplan* today, in light of those modern decisions, is that while the state may in some cases meet its burden by introducing the material in question, that may not always be sufficient, depending on the evidence which is before the trier of fact.

Petitioner has failed to present irreconcilable conflict with any decisions of this Court or with any other court which would warrant certiorari review. On the contrary, the Eleventh Circuit Court of Appeals properly applied *Miller v. California*, *Pope v. Illinois*, and *Bose Corp. v. Consumers Union*, and based its no-obscenity decision in this case on the entire appellate record.

Nor has Petitioner identified an important but unanswered question of federal law for this Court's review. Contrary to the Petitioner's assertions, the decision below was not grounded on the fact that "As Nasty as They Wanna Be" is music, as opposed to some other medium of expression. The Eleventh Circuit observed that this was "the first time that a court of appeals has been asked to apply the *Miller* test to a musical composition, which contains both instrumental music and lyrics," but proceeded to apply the *Miller* test as it would to any allegedly obscene work. (Pet. App. B-4-5). The decision below did not establish any absolute rule requiring expert testimony or rebuttal testimony in all obscenity cases. The Eleventh Circuit did discuss each of the Plaintiffs' expert witnesses' testimony (Pet. App. B-7-10), and contrasted it to the Sheriff's case, which consisted only of the playing of the recording. But the decision below did not depart from established law or create new law; it

merely recognized that in a First Amendment case, the fact-finder may be wrong:

> A fact finder, whether a judge or jury, is *limited in discretion*. "Our standard of review must be faithful to both Rule 52(a) and the rule of independent review." "The rule of independent review assigns to appellate judges a constitutional responsibility that cannot be delegated to the trier of fact," even where that fact finder is a judge.

(Pet. App. B-13-14) (emphasis supplied) (footnotes omitted).

The decision below only addressed "As Nasty as They Wanna Be," and the evidence which was presented at trial. Based on an independent review of the entire record, the Eleventh Circuit concluded:

> We reject the argument that simply by listening to *this* musical work, the judge could determine that it had no serious artistic value.

(Pet. App. B-16) (emphasis supplied). Petitioner's view that this case presents an important but unanswered question of federal law is without merit.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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